Jurisdictional Statement

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Supreme Court of the United States

OCTOBER TERM, 1981

AETNA LIFE AND CASUALTY COMPANY, CRUM AND FORSTER, THE NORTH RIVER INSURANCE COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, THE TRAVELERS INSURANCE COMPANY,

Appellants,

v.

LINDA YOUNG, et al.,

Appellees.

On Appeal from the Superior Court of Connecticut, Fairfield County

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Appellants have published, in national magazines and newspapers, statements critical of our tort liability system and urging reforms. This action, brought by individuals who are plaintiffs in state court tort cases, seeks to enjoin further publication of those statements and to recover damages on the theory that the statements threaten to reduce, or have reduced, the damages they may recover in their tort suits. Appellants' motions to strike the complaint on the ground that it was barred by the First and Fourteenth Amendments were denied, and the Connecticut Supreme Court denied leave to appeal. The questions presented are:

1. Whether the First and Fourteenth Amendments require dismissal of this action?

2. Whether the characterization of appellants' statements as political or commercial speech depends solely on their content, as this Court has held, or, as the court below concluded, on the "motivation" of the speakers?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs-appellees are Linda Young, Karen Cawley, Terry Dugay and Kevin Naylor.

Defendants-appellants are Aetna Life and Casualty Company ("Aetna"), Crum and Forster, The North River Insurance Company, St. Paul Fire and Marine Insurance Company ("St. Paul"), and The Travelers Insurance Company ("Travelers").*

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* Pursuant to Rule 28.1 of the Rules of this Court, a list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of appellants is set forth in Appendix I.

D'Arcy McManus and Massius was also named in the complaint. Plaintiffs voluntarily discontinued their action against that defendant.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	iv
DECISIONS OF THE COURTS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED.	2
STATEMENT OF THE CASE	3
The Facts	3
Prior Proceedings	4
ARGUMENT:	
I. THE CONSEQUENCES OF THE DECISION BELOW, IF NOT NOW REVIEWED AND REVERSED BY THIS COURT, WILL BE SIGNIFICANT AND SEVERE—BOTH FOR APPELLANTS AND FOR THE PUBLIC AT LARGE	7
II. THE FEDERAL QUESTIONS ARE SUBSTANTIAL	9
A. The Decision Below Squarely Conflicts With The Decisions Of Five Different Federal Courts and Creates A Conflict Within The Second Circuit Between The Federal and Connecticut Courts	9
B. The Decision Below Also Conflicts With The Decisions Of This Court	12
C. This Court's Decision In *Nebraska Press Association* v. *Stuart* Shows That The Complaint Should Be Dismissed	17
III. THE DECISION BELOW IS FINAL WITHIN THE MEANING OF 28 U.S.C. § 1257	21
CONCLUSION	26

TABLE OF AUTHORITIES

Cases: PAGE

Bates v. *State Bar of Arizona*, 433 U.S. 350 (1977) 8, 15

Bigelow v. *Virginia*, 421 U.S. 809 (1975) 14n

Branti v. *Finkel*, 445 U.S. 507 (1980) 20n

Chipman v. *Aetna Casualty and Surety Co.*, No. 78-639 CA7 (W.D. Mich. May 22, 1980) 9, 12

Construction Laborers v. *Curry*, 371 U.S. 542 (1963)... 23

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975)..1, 13, 21-24

Crawley v. *Brown*, 4 Conn. Cir. 636, 238 A.2d 453 (Conn. Cir. 1967) 19n

Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) 14n, 15

Elrod v. *Burns*, 427 U.S. 347 (1976) 21n

First National Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978).....14n, 16, 17, 20-21n

Friedman v. *Rogers*, 440 U.S. 1 (1979)..... 14

Garrison v. *Louisiana*, 379 U.S. 64 (1964) 8, 13-14

Gotthilf v. *Sills*, 375 U.S. 79 (1963)..... 1n

Hudson Distributors, Inc. v. *Eli Lilly & Co.*, 377 U.S. 386 (1964)..... 23

Hughes Tool Co. v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973)..... 25

Landmark Communications, Inc. v. *Virginia*, 435 U.S. 829 (1978)..... 13n

Linmark Associates, Inc. v. *Township of Willingboro*, 431 U.S. 85 (1977) 14n

PAGE

Martin v. *Struthers*, 319 U.S. 141 (1943) 21n

Mathews v. *Eldridge*, 424 U.S. 319 (1976) 22

Mercantile National Bank v. *Langdeau*, 371 U.S. 555 (1963) 23

Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241 (1974) 16, 23

Mills v. *Alabama*, 384 U.S. 214 (1966) 13

Nash v. *Florida Industrial Commission*, 389 U.S. 235 (1967) 1n

Naylor v. *Case and McGrath, Inc.*, 585 F.2d 557 (2d Cir. 1978) 5

Nebraska Press Association v. *Stuart*, 423 U.S. 1327 (1975) (Blackmun, J.) (opinion in chambers) 24n

Nebraska Press Association v. *Stuart*, 427 U.S. 539 (1976) 13n, 17-20

New York Times Co. v. *Jascalevich*, 439 U.S. 1331 (1978) (Marshall, J.) (opinion in chambers) 24n

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) ...7, 8, 14n, 16

North Dakota State Board of Pharmacy v. *Snyder's Drug Stores, Inc.*, 414 U.S. 308 (1977) 24

Oklahoma Publishing Co. v. *District Court*, 430 U.S. 308 (1977) 13n

Pickering v. *Board of Education*, 391 U.S. 563 (1968) . 12-13

Quinn v. *Aetna Life & Casualty Co.*, 482 F. Supp. 22 (E.D.N.Y. 1979), *aff'd*, 616 F.2d 38 (2d Cir. 1980) 9-12, 17-19

Rutledge v. *Liability Insurance Industry*, 487 F. Supp. 5 (W.D. La. 1979), *aff'd mem.*, ____ F.2d ____ (5th Cir. Jan. 29, 1981) 9, 11, 18

PAGE

Smith v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979) 20n

State v. *Higgs*, 143 Conn. 138, 120 A.2d 152 (1956) ..18, 19n

United States v. *Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977) 21n

United States v. *Robel*, 389 U.S. 258 (1967) 21n

Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) 14n, 15

Williams v. *Florida*, 399 U.S. 78 (1970) 1n

Constitutional Provisions and Statutes:

U.S. Const. Amend. I 2
U.S. Const. Amend. XIV, § 1 2
28 U.S.C. § 1257 21
28 U.S.C. § 1257(2) 1, 25
28 U.S.C. § 1257(3) 2
28 U.S.C. § 1441(a), (b) 5
28 U.S.C. § 1291 ..... 5n
28 U.S.C. § 1985(3) 4
28 U.S.C. § 2103 2
28 U.S.C. § 2403(b) 2n
Connecticut Unfair Trade Practices Act ("CUTPA"), C.G.S. §§ 42-110a *et seq.* 1, 2, 4-6, 12, 21, 23
C.G.S. § 51-240 ..... 18n
C.G.S. § 51-241 ..... 19n
C.G.S. § 52-263 ..... 1n
C.G.S. § 52-265(a) 1n
Conn. Practice Book § 3164 (1978) 1n

DECISIONS OF THE COURTS BELOW

The unreported opinion of the Superior Court of Connecticut is reproduced in Appendix A.* The unreported orders of the Supreme Court of Connecticut denying appellants' motion for permission to appeal are set forth in Appendix B.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(2). Appellants' motions to strike the complaint, which is based principally upon the Connecticut Unfair Trade Practices Act ("CUTPA"),** drew "in question the validity of a s'atute of any state on the ground of its being repugnant to the Constitution," and the decision below was "in favor of its validity." The motions were denied by the Connecticut Superior Court on May 26, 1981. Appellants then moved in the Supreme Court of Connecticut for permission to appeal the Superior Court's decision. Those motions were denied on June 18, 1981.*** A Notice of Appeal was filed in the Connecticut Superior Court, Fairfield County, on September 11, 1981. A copy of that Notice is set forth in Appendix C.

As this Court's decision in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), shows, the decision below is final for

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* References to the appendices are prefaced with the appendix letter followed by the page number, *e.g.* (A-4).

** C.G.S. §§ 42-110a *et seq.*

*** Under the applicable rules of State procedure, no appeal could be taken to the Supreme Court of Connecticut, the State's highest court, without that Court's permission. C.G.S. §§ 52-263, 52-265a (1981); Conn. Practice Book § 3164 (1978). Because that permission was denied, the Superior Court was "the highest court of a State in which a decision could be had" on the constitutional question presented. *See Williams* v. *Florida*, 399 U.S. 78, 80 n.5 (1970); *Nash* v. *Florida Indus. Comm'n*, 389 U.S. 235, 237 n.1 (1967); *Gotthilf* v. *Sills*, 375 U.S. 79, 80 (1963).

purposes of this Court's jurisdiction. This point is discussed fully in Point III, *infra*.

Alternatively, the Court should treat this jurisdictional statement as a petition for a writ of certiorari pursuant to 28 U.S.C. §§ 2103 and 1257(3), and the petition should be granted. As we show below, (1) the appeal presents a constitutional question of compelling public importance; and (2) the decision of the Connecticut Superior Court conflicts not only with prior decisions of this Court, but also with the holdings, on the very same constitutional question, of five different federal courts, including two United States Courts of Appeals. Indeed, there is a direct conflict on this issue between the Second Circuit and the Connecticut decision in this case.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

U.S. Const., Amend. I:

> "Congress shall make no law . . . abridging the freedom of speech . . . ."

U.S. Const., Amend. XIV, § 1:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

CUTPA, C.G.S., §§ 42-110a-q (1981)*:

The full text of this statute is reprinted in Appendix H hereto.

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* This appeal draws the constitutionality of CUTPA in question. 28 U.S.C. § 2403(b) may therefore be applicable. See Rule 28.4(c) of the Rules of this Court.

STATEMENT OF THE CASE

The Facts

In 1978, appellants, all of whom are major insurance companies, began publishing in nationally distributed newpapers and magazines statements which urged reform of the tort law system in this country. (Copies of the statements appear in Appendix D.) The statements discuss the current state of the tort liability system. Some report the particulars of certain personal injury cases where, in appellants' views, either the verdicts were excessive or the benefits to the victim were inadequate. Appellants argue in these statements that the public is ill-served by the trend toward excessive verdicts.

The statements also urge reform of the system. Aetna's statements, for example, make the following concrete suggestions for reform:

> (i) Aetna urges that liability should not be assessed where a defendant is not at fault. Aetna thus proposes to do away with the concept of strict liability in tort. (D-3, D-5).
>
> (ii) Aetna urges that a personal injury claimant's own negligence should be considered, either as a complete or partial defense. (D-3, D-5).
>
> (iii) Aetna urges that awards should realistically reflect the actual loss suffered and no more. Aetna thus challenges, *inter alia*, the concept of punitive damages and the collateral source rule. (D-3, D-5).
>
> (iv) Aetna urges the creation of a citizens' commission to study the tort liability system. (D-7).

Each of Aetna's statements ends with a plea for political action: "Don't underestimate your own influence. Use it, as we are trying to use ours." (D-3, D-5, D-7).

The St. Paul statements also identify what St. Paul sees as inequities in the system, and they urge the public to become involved in the public debate on these issues and to tell their legislators what their views are about the tort system. (D-12-17). The Travelers statements similarly identify specific problems and urge public involvement in finding solutions. (D-18-21). The Crum and Forster statements share with the public that company's views of the reasons for rising insurance costs. (D-8-11).*

None of the statements identifies any product or service that is for sale by the sponsoring insurance company or any other company. None urges or suggests that the reader buy insurance or any other service or product from the sponsoring company.

Prior Proceedings

This action was commenced in the Connecticut Superior Court in 1978. It is the last of a number of actions which have been brought across the country in an effort to penalize appellants for making their tort reform statements and to stop their publication. The plaintiffs in all these cases have claimed that they have tort suits pending in the courts and that appellants' statements interfere with their ability to obtain impartial juries in those tort cases. In each of the prior cases decided on the merits, the court held that the action was barred by the First and Fourteenth Amendments.

The complaint in this case contained four counts. (The complaint appears in Appendix E.) Two sought damages and an injunction, respectively, under CUTPA on the theory that the views expressed in appellants' statements were "unfair, deceptive and/or misleading." One sought an injunction under the equity powers of the Connecticut courts. The last sought relief under 42 U.S.C. § 1985(3).

Appellants removed the case to the United States District Court for the District of Connecticut, pursuant to 28 U.S.C.

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* The North River Insurance Company, the remaining defendant, is a subsidiary of Crum and Forster. It published no statements of its own.

§ 1441(a) and (b).* The case then was consolidated with *Naylor* v. *Case and McGrath, Inc.*, a companion case commenced on behalf of the same alleged class of plaintiffs against an advertising agency retained by Aetna.

In April 1978, the District Court dismissed the CUTPA claims, both in this action and in *Naylor*. It held, as a matter of statutory interpretation, that CUTPA did not extend to the statements at issue.

The plaintiffs in *Naylor* appealed.** The insurers defended the District Court's decision both on statutory grounds and, alternatively, on the ground that the complaint was barred by the First and Fourteenth Amendments. But the Second Circuit reversed, holding that the District Court should have abstained. *Naylor* v. *Case and McGrath, Inc.*, 585 F.2d 557 (2d Cir. 1978). *Naylor* and this case then both were remanded to the Connecticut Superior Court.

Not long after the Second Circuit decided *Naylor*, the very same constitutional issue came before it in another case. Because that case did not present any novel issues of state law, abstention was unwarranted. The Second Circuit therefore reached the constitutional issue. It held that the Aetna statements challenged here are fully protected political speech, and affirmed the dismissal of the New York complaint, which was substantially identical to the complaint at bar. *Quinn* v. *Aetna Life & Casualty Co.*, 616 F.2d 38 (2d Cir. 1980).

Relying on the Second Court's decision in *Quinn*, and also on decisions by four other federal courts dismissing challenges to appellants' statements, appellants then moved in the State court to strike the complaint in this action. Appellants argued,

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* The federal claim later was voluntarily withdrawn.

** Appellees in the case at bar were unable to appeal because the District Court did not dismiss the third cause of action in this case, which seeks an injunction against appellants' speech under "common law principles of equity." Accordingly, the order of dismissal was not a final judgment under 28 U.S.C. § 1291. The *Naylor* plaintiffs were unable to appeal because the *Naylor* complaint did not contain such a claim.

inter alia, that their speech is fully protected by the First and Fourteenth Amendments and that application of CUTPA to that speech would be unconstitutional.

On May 26, 1981, the Connecticut Superior Court denied appellants' motions to strike the complaint. It held that CUTPA applies to the challenged statements and that the First and Fourteenth Amendments did not require that the complaint be stricken.

At the heart of the Superior Court's decision was the premise that the challenged statements could be enjoined if they are "commercial speech." It held that it could not determine from the face of the statements whether they are entitled to full First Amendment protection, or are merely "commercial speech" entitled to less protection. "[M]otivation of the defendant-advertisers," the Superior Court wrote, "is a necessary determination preliminary to categorization of the advertising as political or commercial speech." (A-14).

The Superior Court expressly refused to follow the federal decisions which held as a matter of law that the statements at issue are not "commercial speech" and are entitled to the full protection of the First Amendment, and which have dismissed complaints substantially identical to the complaint at bar. Rather, the Superior Court's order contemplates that appellants submit to discovery and trial concerning their motivation in publishing the statements at issue. Evidently, if appellants are found to have acted for commercial reasons in publishing those statements, then appellants may be liable for damages and future publication of the statements may be enjoined.

On June 18, 1981, the Connecticut Supreme Court denied appellants' motion for permission to appeal from the decision of the Superior Court.

ARGUMENT

I

THE CONSEQUENCES OF THE DECISION BELOW, IF NOT NOW REVIEWED AND REVERSED BY THIS COURT, WILL BE SIGNIFICANT AND SEVERE—BOTH FOR APPELLANTS AND FOR THE PUBLIC AT LARGE.

This lawsuit is an attempt by advocates on one side of a public issue to penalize and silence the opposition. Tort claimants would exclude the liability insurance industry from public discussion of the tort liability system.

The First Amendment was designed to prevent any such attempt. It reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). By refusing to dismiss the complaint on its face, and thus requiring appellants to participate in lengthy and costly litigation to vindicate their right to speak out, the Connecticut courts have turned their back on that commitment and paved the way to self-censorship and suppression of speech.

If review of that decision is not granted now, no review can be had until after discovery and trial, and that delay necessarily will chill—if not freeze—First Amendment rights.

The record below shows that the decision, if not overturned, threatens to drive appellants out of the marketplace of ideas. This litigation already has chilled appellants' right to speak; the cost of the litigation alone is a deterrent.

Crum and Forster has decided to avoid becoming enmeshed in similar litigation by avoiding "advocacy advertising" until its constitutional right to speak out without harassment has been recognized in Connecticut. Had Crum and Forster known that its effort to explain its views of the problems with the

current workings of the tort system to the public would result in the expense imposed on it by this litigation, it would not have undertaken to make its views known.* The Superior Court's decision necessarily will cause other appellants to shy away from their advocacy of tort law reform.**

Other corporate speakers, as they become aware of the Superior Court's holding, which essentially eliminates the possibility that a lawsuit challenging corporate statements on public issues can be dismissed at the pleading stage, no doubt will exercise similar caution. As this Court has written: "First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the *in terrorem* effect of the statute. . . . Indeed, such a person might choose not to speak because of uncertainty whether his claim of privilege would prevail if challenged." *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 380 (1977).

Furthermore, it is highly significant, we submit, that the speech at issue here lies close to the core of First Amendment values.

At issue here is not a sportscast, a variety show or some other species of entertainment protected by the broad reach of the First Amendment.

Rather, at issue here are public statements about the adequacy of our laws and public institutions. Appellants' statements "communicated information, expressed opinion, recited grievances, [and] protested claimed abuses . . . [in regard to] matters of the highest public interest and concern." *New York Times Co.* v. *Sullivan, supra,* 376 U.S. at 266. Speech of this type "is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana,* 379 U.S. 64, 74-75 (1964).

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* Affidavit of Albert C. Moore, sworn to June 5, 1981, submitted in support of appellants' application to the Connecticut Supreme Court for permission to appeal.

** Affidavit of Douglas J. Alspaugh, sworn to June 9, 1981, submitted in support of appellants' application to the Connecticut Supreme Court for permission to appeal.

To chill such speech—even for a day, not to mention the months or years it would take to dispose of this case if this appeal is not heard—would, we submit, substantially diminish our democratic processes and freedoms.

In sum, if review is not granted now, serious damage would be done to First Amendment values and hence to the public at large.

II

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

A. The Decision Below Squarely Conflicts With The Decisions Of Five Different Federal Courts And Creates A Conflict Within The Second Circuit Between The Federal And Connecticut Courts.

The decision of the Connecticut Superior Court is directly contrary to the rulings of five federal courts. *Quinn* v. *Aetna Life & Casualty Co.*, 482 F. Supp. 22 (E.D.N.Y. 1979), *aff'd*, 616 F.2d 38 (2d Cir. 1980); *Rutledge* v. *Liability Insurance Industry*, 487 F. Supp. 5 (W.D. La. 1979), *aff'd mem.*, ____ F.2d ____ (5th Cir. Jan. 29, 1981); *Chipman* v. *Aetna Casualty and Surety Co.*, No. 78-639 CA7, (W.D. Mich. May 22, 1980).*

Each of these courts held that Aetna's statements are not mere "commercial speech."** Each of these courts held, as a matter of law, that these statements are entitled to full First Amendment protection. With one minor exception, each of these courts dismissed complaints before the plaintiffs in those cases had any discovery, for each of these courts held that the plaintiffs could not prevail on any state of the facts.***

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* The unpublished decisions by the Fifth Circuit and by the Western District of Michigan are reproduced in Appendices F and G hereto, respectively.

** *Rutledge* reached the same conclusion with respect to the statements of St. Paul, Travelers and Crum and Forster.

*** In *Rutledge*, the plaintiff obtained some document production from St. Paul.

In *Quinn* v. *Aetna*, 482 F. Supp. 22, 29-30 (E.D.N.Y. 1979), the district court expressly rejected the reasoning used by the Connecticut Superior Court below:

> The speech involved in the present case is not commercial speech removed from any "exposition of ideas." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). The speech involved here is fully protected political expression. The degree of protection afforded the expression is not lessened by the fact that it is contained in a paid advertisement, *Buckley* v. *Valeo*, 424 U.S. 1, 51, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265-66, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), or that the speaker is a corporation rather than a natural person. *First National Bank of Boston* v. *Bellotti*, 435 U.S. 764, 777, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978). Nor is the protection given to speech directed at issues of public concern lost because of improper intent of the speaker.[4] *See Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 139, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961). The First Amendment protects the speech itself. *See First National Bank, supra*, 435 U.S. at 776-77, 98 S. Ct. 1407. The contents of speech cannot be suppressed because we find the speaker biased or the conclusions erroneous or misleading, "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *Id.* at 791, 98 S. Ct. at 1424. It is presumed that in evaluating such speech "the source and credibility of the advocate" will be considered. *Id.* at 792, 98 S. Ct. at 1424.

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4. The advertisements in question were not directed solely to jurors but to the general reading public. Whether or not defendant intended the advertisement to have the effect of causing jurors to return lower awards, as plain-

> tiffs allege, is irrelevant to the question of whether the speech directed to the general public is protected. This case does not present the situation where the information presented in the advertisements is sent directly to the jurors in a particular case or to those called for jury duty.

The district court's decision in *Quinn* was affirmed, and the opinion praised as "thorough and considered," by the United States Court of Appeals for the Second Circuit in *Quinn* v. *Aetna Life & Casualty Co.*, 616 F.2d 38, 40 (1980).

In *Rutledge, supra,* 487 F. Supp. 5, 8, the District Court reached the same conclusion:

> The ads make no attempt to sell insurance or to recommend any particular type of insurance coverage; they propose no commercial transaction. Speech is not stripped of First Amendment protection merely because it is made in the form of a paid advertisement; nor does the fact that it reflects the advertiser's commercial and financial interests deny it constitutional protection. *Bigelow* v. *Virginia,* 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975). These ads communicate information about the insurance industry and disseminate that industry's opinion and position on matters of public concern, particularly reform of the tort law.
>
> I conclude that the ads in question should not be characterized as "commercial speech." See *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978); *Bigelow, supra* and *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 868 (1964).

The Fifth Circuit affirmed the District Court's decision in *Rutledge* without opinion. (F-1).

The United States District Court for the Western District of Michigan also rejected the notion that these statements are mere "commercial speech." In direct contradiction of the

opinion below, that court held that appellants' motivation or intent is "irrelevant to the question of whether the ads directed to national readers are protected by the First Amendment." *Chipman* v. *Aetna Casualty and Surety Co., supra.* (G-3).

The Connecticut Superior Court declared below that it was "fully aware of" and had "examined in detail" each of these federal decisions. (A-14). It nevertheless denied appellants' motions to strike, holding in substance that CUTPA may constitutionally be applied to enjoin these statements, or to award damages against appellants, at least if it concludes that appellants' "motivation" is commercial.

In short, the decision below by the Connecticut Superior Court is directly contrary to the decisions of five federal courts, including two United States Courts of Appeals.

Moreover, there is a split within a federal judicial circuit on the constitutional questions presented. The decision below is directly contrary to the *Quinn* decision by the Second Circuit. Because Connecticut is in the Second Circuit, the outcome of an action like that at bar depends on whether the plaintiff files his complaint in state or federal court. By filing a complaint in the state courts, a party who opposes debate on a particular issue is assured, at a minimum, of forcing the defendant speaker to participate in a costly inquiry into his "motives" for speaking out—whereas if the same complaint were filed in the Connecticut federal court, it would be dismissed out of hand on the authority of *Quinn*. In addition to all the other reasons for hearing this case, this Court should take jurisdiction to rectify this highly anomalous situation.

B. The Decision Below Also Conflicts With The Decisions Of This Court.

1. The First Amendment was designed to protect speech which calls to public attention what the speaker believes are inequities and inefficiencies in our laws. Its "core value" is "[t]he public interest in having free and unhindered debate on

matters of public importance." *Pickering* v. *Board of Education*, 391 U.S. 563, 573 (1968). Thus, this Court has written:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.

Mills v. *Alabama*, 384 U.S. 214, 218-19 (1966).

The statements challenged here fit squarely within the core protection of the First Amendment. They consist of two elements.

First, appellants' statements discuss the current state of the tort liability system. Such discussion of judicial proceedings is absolutely protected. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). This Court there held that a broadcasting company had a right to report "with impunity" the name of a rape victim obtained from judicial records. *Id.* at 492. In so holding, it explained the "critical importance to our type of government," *id.* at 495, of the dissemination of information concerning the administration of justice. *Id.* at 491-92.*

The second element of appellants' statements is argument that the tort liability system should be reformed, and recommendations for reform. Again, this is classic First Amendment-protected expression. If the First Amendment stands for anything, it stands for the proposition that a citizen has a right to try to persuade his fellow citizens that a particular law should be enacted or reformed. Such speech "is more than

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* *See also Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 839 (1978) ("The operations of the courts and the judicial conduct of judges are matters of utmost public concern."); *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308 (1977); *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 568 (1976).

self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964).

2. Appellants' speech is not mere "commercial speech." This Court has affirmed and reaffirmed that commercial speech is speech which "relates to a particular product or service," "does no more than propose a commercial transaction," and "is used as part of a proposal of a commercial transaction." *Friedman* v. *Rogers*, 440 U.S. 1, 10, n.9 and 11 (1979).*

Appellants' statements do no such thing. They describe no products for sale and propose no commercial transactions. They instead are full of "editorializ[ing]" and "general observations," speech which "is categorically different from the mere solicitation of patronage . . ." which characterizes commercial speech. *Friedman*, *supra*, 440 U.S. at 11-12 and n.10. They are part of the "free discussion of governmental affairs [which] is at the heart of the First Amendment's protection." *Friedman*, *supra*, 440 U.S. at 11, n.10.**

3. Contrary to the decision below, appellants' motives in speaking out are immaterial. The constitutional bar to infringement of speech depends not upon some nebulous concept of the speaker's motive, but upon the rock of what the speaker

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* *Accord*, *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85, 98 (1977) (commercial speech "does no more than propose a commercial transaction"); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (commercial speech is "dissemination of information as to who is producing and selling what product, for what reason, and at what price"); *Bigelow* v. *Virginia*, 421 U.S. 809, 820-21 (1975).

** The fact that appellants are corporate citizens and that they paid for their statements to appear does not diminish the protection to which the statements are entitled. *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265-66 (1964). Similarly, the fact that appellants' statements concern a public issue which relates to their business does not transform those statements into commercial speech or otherwise lessen their protected status. *See Eastern R.R. Pres. Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961); *First Nat'l Bank of Boston*, *supra*, 435 U.S. at 783-84 and n.20.

in fact says. Speech concerning a public issue is constitutionally protected irrespective of the intent which motivates it.

For example, this Court has held in substance that a conspiracy to influence the government to take action adverse to one's business competitors is constitutionally protected even if the conspirators' sole purpose is to destroy their competitors. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961) ("The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so.")

This Court has also made clear that whether speech is "commercial" or otherwise is to be determined from the speech itself, and nothing more. "If commercial speech is to be distinguished it 'must be distinguished by its content.' " *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 363 (1977), *quoting Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

A contrary conclusion—a conclusion that freedom of speech depends on the motive of the speaker—would materially subvert the First Amendment. It would permit any statement on a public issue to be challenged on the basis of a conclusory assertion of improper intent.

The danger of a contrary view is well illustrated by this case. Appellees' contention, that appellants' intent was impure, springs from the fact that their statements about tort law reform argue that the present law is contrary to the economic welfare of the citizenry. According to appellees, then, debate concerning public issues such as tort law reform must proceed in a rarefied atmosphere in which only the most neutral statements, divorced in particular from the audience's economic interests, are permitted. More vigorous statements raise the issue of what the speaker "really" intended to influence, and an impermissible intention will make that speech actionable.

The fact, however, is that public issues are public issues largely because they affect such concrete interests as people's economic welfare, and speech that discusses the effects of various public policies upon private pocketbooks is among the most valuable of political speech. If such speech were to be disallowed—and the speaker subjected to suit—upon an argument that the speaker really had some improper objective in mind, debate on public issues would be stifled. Appellees' position thus would undermine the principle that the debate on public issues should be "uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 270.

Furthermore, appellees' position—adopted by the Superior Court below—proves much too much. If motivation were the touchstone of constitutional protection, all corporate speech would be mere "commercial speech." Yet *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), shows that that simply is not so.

In short, appellants' "motivation" is beside the point.

Finally, the argument has been made, here and in the other cases, that appellants' statements are false and misleading and that they may be regulated on that ground.

First, the allegation of unfairness and deception here amounts to no more than the argument that appellants' position on the public issue of tort reform is, in appellees' view, unbalanced and wrong. Appellees allege, for example, that appellants' speech is misleading because it "suggests that checks and balances do not exist in the judicial system to prevent excessive awards. . . ." (E-7).

The claim, then, is that appellants have an obligation to present what appellees would regard as a fair and balanced view of the arguments for and against tort law reform. The First Amendment, however, gives a citizen the right to speak his own mind, no matter how that comports with the views which others may have, and no matter how "unfair" (E-4, E-6, E-9, E-10) someone else may think that speech is. *E.g.*, *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974).

The same argument that appellees make here was made and rejected in the several other court challenges to these statements. As the District Court wrote in *Quinn*:

> The contents of speech cannot be suppressed because we find the speaker biased or the conclusions erroneous or misleading, "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *Id.* at 791. It is presumed that in evaluating such speech "the source and credibility of the advocate" will be considered.

482 F.Supp. at 30, *quoting First National Bank of Boston, supra*, 435 U.S. at 792.

C. This Court's Decision In *Nebraska Press Association* v. *Stuart* Shows That The Complaint Should Be Dismissed.

As the federal courts have recognized, the case at bar is governed by the reasoning of *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976).

Nebraska Press involved a sexually-motivated mass murder in a small town. The accused admitted his guilt to relatives and confessed to public officials. Defense counsel and the State's Attorney both applied to the State trial court for an order enjoining the publication of these admissions. The trial judge made an express finding that there was "a clear and present danger" that the publication, prior to trial, of the confession could deprive the accused of a fair trial. On this finding, the judge enjoined the press from printing accounts of the confession. 427 U.S. at 542-43.

This Court reversed. It acknowledged that the trial court justifiably had concluded that publication of the confession could undermine the accused's right to a fair trial in the absence of corrective action. Nevertheless, and although the case involved a murder trial in which the punishment might be death,* this Court held that measures short of infringment

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* The accused in fact was found guilty of murder and was sentenced to death. 427 U.S. at 546.

upon speech, such as careful *voir dire* and emphatic jury instructions, were sufficient to ensure a fair trial. 427 U.S. at 563-65.

The case at bar is governed by Nebraska Press, for several reasons:

(i) As the District Court said in *Rutledge*, *supra*, 487 F. Supp. at 9: "Here, the threat to fair trial is more remote than was the threat in *Nebraska Press* since these ads are not directed to any specific case."

(ii) As the District Court pointed out in *Quinn*, *supra*, 482 F. Supp. at 30: "In *Nebraska Press* the speech sought to be restrained [consisted of] accounts of confessions and admissions of the defendant. . . ."

Consequently, those statements were likely to be highly prejudicial to the party who sought to suppress them. Here, the very opposite is true: the statements in question (if they were to have any "influence" at all, which appellants deny) are likely to be *helpful* to appellants; thus, the law generally presumes that injecting insurance into tort actions will result in unduly high verdicts in favor of plaintiffs because the jury will assume that insurance companies, rather than the individual defendants involved, will bear the cost of the verdict. Only supposition supports the notion that appellants' statements will prejudice appellees.

(iii) As the District Court in *Quinn* also noted, 482 F. Supp. at 30: "[T]he consequences for the accused in *Nebraska Press* [*i.e.*, the death penalty] were graver than the potential consequences for plaintiffs here . . . ."

(iv) As all the federal courts have found, any slight biasing influence appellants' speech may have—and appellants submit that there is none—is readily remedied by the traditional means of protecting against bias in trial juries.* Certainly that is

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* Connecticut law provides rigorous and adequate safeguards against potentially biasing influences. Connecticut law permits an extensive *voir dire* of individual veniremen. C.G.S. § 51-240 (1981); *State* v.

[footnote continued on next page]

much more easily accomplished here than in *Nebraska Press*, where this Court expressed confidence in the ability of those protective devices to overcome the effect of the sensational confession. 427 U.S. at 564. The District Court in *Quinn*, *supra*, made the same point, 482 F. Supp. at 28:

> The [contention] that plaintiffs' remedies at law— which include the right to voir dire, proper jury instructions, and the jurors' oath—are inadequate to overcome what prejudicial effect these advertisements may have, is untenable. *See Nebraska Press*, *supra*, 427 U.S. at 563-65 . . . The courts regularly rely on such means to secure juries untainted by newspaper coverage of much more pointed prejudicial effect.

(v) The infringement upon speech sought by appellees would be less effective than the infringement sought in *Nebraska Press*. With or without Aetna's participation, public debate concerning the reform of the tort liability system will continue. To penalize appellants for participating in that debate would serve only to muzzle one important side of the argument. Surely that result would be both unconscionable and unconstitutional.

Higgs, 143 Conn. 138, 120 A.2d 152 (1956). Should plaintiffs' counsel think it necessary, counsel can ask individual veniremen searching questions on *voir dire* designated to elicit (a) whether they have read particular magazines, or statements, and (b) whether they will follow the judge's instructions or whether they have some personal view which might interfere with their obligation to decide the case on the basis of the law as given by the trial judge. Counsel may also challenge jurors, for cause or peremptorily. C.G.S. § 51-241 (1981); *Crawley* v. *Brown*, 4 Conn. Cir. 636, 238 A.2d 453 (Conn. Cir. 1967). And, of course, plaintiffs are entitled to clear and firm jury instructions concerning the jury's duty to accept the law as given and to decide the case on its merits—an obligation which each juror swears diligently to fulfill. Furthermore, in the rare instance where a jury returns an unjust verdict, the State courts can use their powers of additur and remittitur. At the end of the process, the result is a verdict that has judicially been determined to be fair. Appellees evidently do not dispute the adequacy of these various safeguards; the complaint does not allege that they are inadequate.

(vi) There is another important reason why the case for unhindered speech is far more compelling here than in *Nebraska Press*. This case, after all, involves an appeal for law reform, not merely the publication of a lurid confession. At bottom, appellees' complaint is that appellants may persuade potential jurors that current tort law is wrongheaded and contrary to their interests; such speech, appellees say, threatens to convince citizens that they should ignore the law when they serve as jurors and should not be permitted to accomplish that result.

This is a most pernicious argument, one which points the way to tyranny. It would silence debate on the worth of every rule of law which ever comes before a jury, thereby freezing both First Amendment rights and the state of those laws. It would draw a curtain over some of the most significant of public issues. On this theory, for example, we would end public debate on the capital punishment issue for fear that the debate itself might influence potential jurors in capital cases to disregard the law as given to them by the trial judge. On this theory, manufacturers could not urge limitations upon product liability, nor could doctors argue for relief from malpractice doctrines.

That theory, *Nebraska Press* makes clear, is not the law of this land.

We recognize, of course, that *Nebraska Press* involved an injunction. However, the principles set forth in *Nebraska Press* are equally applicable here.

It long has been a central tenet of First Amendment analysis that speech may not be proscribed, punished, or restrained—either before or after the fact, and even in furtherance of an important state interest—unless there is no way to protect that state interest by means less restrictive of First Amendment values. This Court repeatedly has held those who would abridge speech to this test.* It is a major theme in *Nebraska Press*.

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* *E.g.*, *Branti* v. *Finkel*, 445 U.S. 507 (1980); *Smith* v. *Daily Mail Pub. Co.*, 443 U.S. 97 (1979); *First Nat'l Bank of Boston* v. *Bellotti*, *supra*,

[footnote continued on next page]

As the federal courts, following *Nebraska Press*, uniformly have found, the various safeguards provided by state law ensure that juries can be had which will fairly try appellants' personal injury actions. *Voir dire*, challenges for cause, peremptory challenges, the trial court's instructions to the jury, the jurors' oath, and judicial review (appellate and otherwise) long have served this function well. Indeed, they have been equal to the task even in notorious criminal cases where the defendant's interest was much stronger, the dissemination of allegedly prejudicial information much wider, and the relationship between pretrial publicity and the facts of a particular pending case absolutely clear.* Regulation of appellants' right to publicize their views concerning tort law reform plainly is not the least restrictive alternative available to further the proffered interest.

That being so, CUTPA may not, consistent with the First and Fourteenth Amendments, be applied to the speech at issue here, and the complaint at bar should be dismissed.

* * *

In sum, the decision below squarely conflicts with decisions by five different federal courts on the very same issue, and it also conflicts with the prior decisions of this Court.

III

THE DECISION BELOW IS FINAL WITHIN THE MEANING OF 28 U.S.C. § 1257

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469, 482-87 (1975), shows that the decision below is final within the meaning of 28 U.S.C. § 1257.

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435 U.S. at 786; *Elrod* v. *Burns*, 427 U.S. 347, 369 (1976); *United States* v. *Robel*, 389 U.S. 258, 268 (1967); *Martin* v. *Struthers*, 319 U.S. 141 (1943).

* *E.g.*, *United States* v. *Haldeman*, 559 F.2d 31, 59-71 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977).

In *Cox* an action was brought under a state law authorizing suits against the press for publishing the name of a rape victim. The state trial court granted summary judgment for the plaintiff, rejecting the defense contention that the statute violated the First and Fourteenth Amendments. The Georgia Supreme Court ruled, however, that the entry of summary judgment for the plaintiff was erroneous, and the case was remanded for trial.

Despite the fact that the decision of the Georgia Supreme Court in *Cox* contemplated further state court proceedings, this Court ruled that the finality requirement of Section 1257 had been met and took jurisdiction. The *Cox* opinion reviewed the many cases where the finality requirement of Section 1257 had been deemed satisfied in such circumstances. The "core principle" established by those cases is that the requirement should be "construed so as not to cause . . . potentially irreparable injuries to be suffered." *Mathews* v. *Eldridge*, 424 U.S. 319, 331 n.1 (1976).

The *Cox* opinion noted that the finality requirement is satisfied, among other circumstances,

> where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

420 U.S. at 482-483. *See also*, *Miami Herald Publishing Co.* v.

Tornillo, 418 U.S. 241, 247, n.6 (1974); *Construction Laborers* v. *Curry*, 371 U.S. 542, 550 (1963); *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963); *Hudson Distributors* v. *Eli Lilly*, 377 U.S. 386, 389, n.4 (1964).

Applying these principles in *Cox*, this Court wrote:

> [E]ven if appellants prevailed at trial and made unnecessary further consideration of the constitutional question, there would remain in effect the unreviewed decision of the State Supreme Court that a civil action for publishing the name of a rape victim disclosed in a public judicial proceeding may go forward despite the First and Fourteenth Amendments. Delaying final decision of the First Amendment claim until after trial . . . will "leave unanswered . . . an important question . . . under the First Amendment," "an uneasy and unsettled constitutional posture that could only further harm" [First Amendment rights]. [citation omitted] . . . On the other hand, if we now hold that the First and Fourteenth Amendments bar civil liability . . ., this litigation ends.

420 U.S. at 485-86.

This Court therefore concluded that according finality to the state court judgment in *Cox* was "consistent with the pragmatic approach we have followed in the past in determining finality." 420 U.S. at 486.

So, too, here. The State court has made a final determination that the United States Constitution does not require appellees' complaint to be dismissed on its face. Reversal of that decision, of course, would end this case.*

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* As we have noted, appellees have alleged a non-CUTPA cause of action, under "common law principles of equity." Of course, if their CUTPA claim cannot pass constitutional muster and must be dismissed as barred by the First and Fourteenth Amendments, their amorphous, non-statutory claim falls *a fortiori*.

On the other hand, as we have demonstrated, *supra*, Point I, if the decision below is allowed to stand—for whatever period of time—there necessarily will be a chilling effect upon precious First Amendment rights that *would*—not "might," *Cox Broadcasting*, *supra*, 420 U.S. at 483—"seriously erode federal policy." *Id.* For these reasons, this Court has jurisdiction of this appeal.*

None of the interests served by the finality requirement would be harmed by taking jurisdiction of this appeal. In *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973), three such interests were identified:

> The finality requirement of 28 U.S.C. § 1257 . . . serves several ends: (1) it avoids piecemeal review of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Art. III; (3) it limits review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.

1. There is little chance of piecemeal review in this case. Far more likely, appellants will prevail at trial—but only after enormous damage has been done to First Amendment values.

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* This Court has jurisdiction despite the fact that the Connecticut Supreme Court denied appellants' application for permission to appeal. Before the Connecticut Supreme Court could again be in a position to review the Superior Court's decision, appellants will have already suffered irreparable injury. Every day that the Superior Court's decision remains in effect, their First Amendment rights are impaired—an intolerable situation. Moreover, subjecting appellants to the burdens of this litigation in the Superior Court itself is a penalty for the exercise of First Amendment rights. Appellants' "inability. . . to obtain timely substantive review by state courts of a serious First Amendment issue, prior to incurring substantial coercive penalties" justifies a determination that they have satisfied the jurisdictional requirement of finality. *New York Times Co.* v. *Jascalevich*, 439 U.S. 1331, 1333-34 (1978), (Marshall, J.) (opinion in chambers). *See also Nebraska Press Association* v. *Stuart*, 423 U.S. 1327, 1329-30 (1975). (Blackmun, J.) (opinion in chambers).

2. The controversy at bar could not be more real. In this case, as in the several other such challenges to appellants' position papers which have been brought in courts around the country, personal injury litigants and their counsel are pitted against several large insurance companies. The insurers want to persuade the citizenry, among other things, to eliminate or restrict punitive damage awards and to regulate contingent fee arrangements more closely; the personal injury litigants and their counsel not only oppose these reforms, but also seek to quash public debate on these issues.

3. Taking jurisdiction in this case would not intrude upon State affairs. If the United States Constitution bars this action, the time to find that out is now—before the courts of the State of Connecticut devote more time and attention to this case. Surely, the State's interests would not be served by a lengthy litigation culminating in a determination that the complaint should have been dismissed at the outset. *Cf. Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973).

For all these reasons, then, this Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1257(2).

CONCLUSION

For the reasons set forth above, this Court should note probable jurisdiction of this appeal or, alternatively, treat this jurisdictional statement as a petition for a writ of certiorari and grant the petition.

Dated: September 15, 1981
New York, New York

Respectfully submitted,

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APPENDICES

Appendix A

Opinion of the Superior Court of Connecticut

SUPERIOR COURT

JUDICIAL DISTRICT OF FAIRFIELD (BRIDGEPORT)

May 14, 1981

No. 16 89 46

LINDA YOUNG, ET AL.

vs.

CRUM AND FORSTER, ET AL.

Filed

May 26, 1981

Office of the Clerk
Superior Court

MEMORANDUM OF DECISION ON MOTIONS TO STRIKE OF DEFENDANTS

(1) CRUM AND FORSTER and NORTH RIVER INSURANCE COMPANY;

(2) THE TRAVELERS INSURANCE COMPANY;

(3) ST. PAUL FIRE AND MARINE INSURANCE COMPANY; and

(4) AETNA LIFE AND CASUALTY COMPANY.

I

The motion to strike is a creature of the rules of the Superior Court rather than of state statutes. By such motion the initiator contests the legal sufficiency of the allegations of some pleading. Conn. Pract. (M.&H.), 2d Ed. -1, §§ 151-158. The rules pertaining to those motions are enhanced only by the statutory

requirement that they "distinctly specify the reason or reasons why the pleading demurred to is insufficient." C.G.S. § 52-92.[1] To examine the history and function of the "motion to strike", we must examine the law developed under the rubric of demurrer, since, in reality, they are one and the same. " 'A demurrer is not a mere procedural nicety, but is a precise instrument for the final determination on the merits of justiciability under pertinent rules of law of an asserted cause of action or defense. It is the formal mode of disputing the sufficiency in law of the pleading to which it pertains.' 71 C.J.S. 426." *Doherty* v. *Town of Winchester,* 18 Conn. Sup. 475, 478-9. "The function of a demurrer is to test the sufficiency of [the] pleading" to which it is directed. *Mainolfi* v. *Zoning Board of Appeals of the City of Derby,* 146 Conn. 634, 636. A demurrer admits the facts averred in the complaint as they are made (*Ryan* v. *Knights of Columbus,* 82 Conn. 91, 92) and "for the purposes pertaining to it, [the demurrer] must be taken as admitting the allegations of the complaint". *Connecticut Rural Roads Improvement Association* v. *Hurley,* 124 Conn. 20, 25. It, therefore, follows that the question before the court becomes whether those facts present a cause of action. See, inter alia, *Blakeslee* v. *Board of Water Commissioners of the City of Hartford,* 106 Conn. 642 and *Rutt* v. *Roche,* 138 Conn. 605. "The court cannot, in considering the limits of a demurrer, 'bring additional facts into the record.' State ex rel. Moriarty v. Smith, 72 Conn. 572, 574." *Moore* v. *State of Connecticut,* 15 Conn. Sup. 251, 252.

II

The issues presented in this case revolve around the law of "commercial speech". It is unnecessary to reach the defendants' other arguments for striking because the resolution of the "speech" questions is dispositive of the other issues.

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1 It should be noted that C.G.S. § 52-92 is concerned with demurrers, while §§ 151-158 Conn. Pract. supra, deal with motions to strike. As noted in the Authors' Comments, *Id.*, 231, infra § 151, while §§ 152-158 replace the "demurrer", they "change very little other than the name of the pleading."

When "commercial speech" was first defined and given special treatment in the early 1940s, the United States Supreme Court used a balancing test to determine the constitutionality of infringement upon it. The court balanced the degree of encroachment upon freedom of speech and of the press under the First Amendment to the United States Constitution against the interests of society which would be served by the subject encroachment. Although this test is employed today, there is now a trend toward providing greater constitutional protection of speech, be it commercial or political, unless the speech at issue is plainly false or misleading or unless it is so harmful that it would be against society's interests to protect it.

The first case which distinguished commercial speech from political speech is *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942), where the court upheld a New York city ordinance prohibiting the distribution in the streets of a particular type of handbill. The defendant, a Florida citizen, moored his former United States Navy submarine, which he exhibited for profit, at a State pier in the East River. The handbills he prepared and printed advertised the boat and solicited visitors for a stated admission fee. He was advised by the police commissioner that it was unlawful under the sanitary code to distribute in the streets handbills containing "commercial and business advertising matter, but was told that he might freely distribute handbills solely directed to 'information or a public protest.' " *Id.*, 53. The defendant then redrafted the original handbill, eliminating the matter of the admission fee and consisting only of commercial advertising on one side and on the other side a protest against action of the City Dock Department in refusing him wharfage facilities at a city pier for exhibition of his submarine but no commercial advertising. He was advised by the police department "that distribution of a bill containing only the protest would not violate § 318 [of the Sanitary Code], and would not be restrained, but that distribution of the double-faced bill was prohibited. The respondent, nevertheless, proceeded with the printing of his proposed bill and started to distribute it. He was restrained by the police." *Id.*, 53. The court defined "commercial speech" as advertising for "private profit", or advertising

to "promote or pursue a gainful occupation in the streets"; whereas "political speech" was defined as speech which informed the public or protested a particular action. The court continued and said that advertisements which were informative or expressed a personal and, therefore, political point of view, were protected by the First Amendment, but that those published for the purpose of financial gain and, therefore, commercial, were subject to some restraint.

The court balanced the benefit to be gained by the public through the ordinance against the infringement on the entrepreneur's limited right to freedom of speech. It concluded that the city's interest in maintaining the free use of the highways for the public at large outweighed the businessman's interest in distributing handbills for his own financial benefit. This case established separate standards for the treatment of "commercial speech" and "political speech". Recognizing that a lesser degree of protection was appropriate in the case before it, the *Valentine* court weighed the benefit to society against encroachment on free speech.

A year later in *Murdock* v. *Pennsylvania,* 319 U.S. 105, 106 (1943) the court, in striking down as being too broad an ordinance of the Borough of Jeannette, pertaining to the licensing and taxation of persons canvassing for or soliciting orders for merchandise or delivery of them, excepting those " ' . . . selling by sample to manufacturers or licensed merchants or dealers doing business in said Borough of Jeannette' ", emphasized that the First Amendment freedoms of speech, press, and religion were in a preferred position. The court based its decision on the fact that the ordinance included a prohibition against religious solicitation and there, specifically, referred to "Jehovah's Witnesses". The court held that a community could not tax or suppress views through such an ordinance. In determining whether such "speech" was commercial or political, the court stated, at p. 111, that "the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise." In distinguishing this case from *Valentine,* supra, the court held that just as distributing leaflets which contained both commer-

cial and political speech did not render them purely political, the distribution of religious leaflets for a small fee did not necessarily constitute commercial speech. Therefore, determination of whether literature was commercial or political would depend on its essential purpose. In *Murdock* the solicitors' goal was to spread their religious convictions rather than to achieve financial gain. Since freedom of religion is afforded a high degree of protection by the United States constitution, the borough could not limit the rights of the religious solicitors simply because there was some commercial aspect to their activity. Political speech, which includes any expression of personal views, therefore, may be subject to First Amendment protection even if there is a commercial aspect to it.

In 1951 the United States Supreme Court again dealt with the degree of protection afforded commercial speech in *Breard* v. *Alexandria,* 341 U.S. 622 (1951). The ordinance under review there barred the door-to-door selling of magazines without the prior consent of the householder. The court recognized that the selling of periodicals was protected by the First Amendment but also pointed out that the selling process brought the case within the purview of commercial speech. It stated, at p. 642: "The First and Fourteenth Amendments have never been treated as absolutes. Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life." Therefore, the constitutionality of the ordinance was determined by balancing the householder's right to privacy against the solicitor's right to sell publications, the court holding there that the citizen's right to privacy outweighed the solicitor's right of freedom in his commercial speech. When the constitutional protection of commercial speech results in the denial of some other fundamental right to the community at large, the court will not support the commercial enterprise. Here, again, the court indicated that the constitution will not protect commercial communications to the extent that it will protect other fundamental rights.

The court again refused to apply a strict interpretation of political and commercial speech in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), involving a newspaper advertisement containing statements about police actions during a student demonstration. The respondent contended that there was no First Amendment protection because the advertisement had been paid for and, therefore, it should be considered commercial speech. However, the court held that was political speech because the goal of the individuals who paid for the advertisement was to express outrage at certain claimed abuses by the police and also to seek financial support. These matters were considered to be of the highest public interest. The court emphasized that the purpose of the First Amendment was to encourage the spreading of information from any and all sources and to encourage the free expression of ideas; also that the First Amendment protection would not be removed simply because there was a commercial aspect to the advertisement. Again, here, the court examined both the political and commercial aspects of the subject advertisement. The greater the political content found, the greater would be the First Amendment protection afforded by the court.

A statute which prohibited the placing of pandering advertisements in the mail was upheld in *Rowan* v. *United States Post Office Department*, 300 F.Supp. 1036 (C.D. Cal. 1969). The test used was that used in *Breard*, supra. The court held that when freedom of speech invades another right, such as the right to privacy, there must be a balancing of the interests protected of both those rights. The court, at p. 1040, quoted from Kovacs v. Cooper, 336 U.S. 77, at 88:

> "'* * * The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself. * * *'"

The court, at p. 1044, stated:

> "The degree to which the First Amendment applies to protect speech varies with society's interest in the content of that speech. 'Purely commercial advertising' has never received the same kind of constitutional protection as that afforded to expressions of greater public concern. The commercial element does not altogether destroy its quality as protected speech, but it does substantially reduce the weight of the expression on constitutional scales. . . . Commercial advertising can be reasonably regulated without offending the First Amendment. [citations omitted]."

In that case the court indicated the weight to be accorded the "commercial" aspect of speech.

The balancing of interests was again considered in *Barrick Realty, Incorporated* v. *City of Gary, Indiana,* 354 F.Supp. 126 (1973) which involved an ordinance which prohibited the display of "For Sale", "Sold", or similar signs in residential areas of Gary, Indiana. The District Court held that there was no violation of the First Amendment. The court referred to the signs as "purely commercial" without further discussion as to the meaning of that description, implying that the original definition of commercial speech as set forth in *Valentine,* supra, was then understood to be the definition of commercial speech. In *Barrick* the court found that such signs might encourage panic selling and that in balancing the citizens' interests in maintaining their property values as against any infringement on commercial speech, that type of ordinance met the consitutional test.

Subsequent cases show a trend toward greater First Amendment protection of commercial speech.

In *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376 (1973), reh. den. 414 U.S. 881, an ordinance which prohibited potential employers from indicating sex preference in their help-wanted advertisements was upheld. Again, the court addressed the issue of whether such ad-

vertisements were commercial or political. Since the advertisements did not express any opinion as to whether, as a matter of social policy, positions should be filled by one sex or the other, they were considered essentially commercial because they made a proposal for gainful employment. Although *Pittsburgh Press* argued that commercial speech should be afforded a higher level of protection than it was accorded in *Valentine*, supra, the court did not address that issue since the advertisements themselves were held to be illegal under the ordinance. However, it did point out that the interests served by ordinary commercial proposals might be found to outweigh a governmental interest, thus paving the way for greater constitutional protection of commercial speech. In his dissenting opinion, Chief Justice Burger found that decision to be an expansion of the "commercial speech doctrine" and, therefore, a disturbing limitation of freedom of the press, since the effect of the ordinance was to dictate to newspapers the structure of the layout of the help-wanted advertisements.

Pittsburgh Press was the first indication that the Supreme Court was beginning to concern itself with the degree of control there ought to be over speech and press, even when such control would be justified as to commercial speech and it enjoy less protection.

In *Bigelow* v. *Virginia*, 421 U.S. 809 the First Amendment was found to be violated by a Virginia statute which prohibited the publication of any advertisement which encouraged abortions. That court held that Virginia could not inhibit the communication of information which was available to citizens of other states. In setting out a higher standard of protection, it stated, at p. 826, that "[t]he relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas." The court reasoned that although such advertisements had commercial aspects, the information conveyed was of interest and value and, therefore, constitutionally protected. It also balanced the state's interest of maintaining high-quality medical care against the invasion of First Amendment rights, but found that the ordinance did not protect any state's interest.

Another Virginia statute was found unconstitutional in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). The statute banned the advertising of prescription drugs. That court pointed out that since *Breard*, supra, First Amendment protection had not been denied to commercial speech and that since *Bigelow*, supra, "the notion of unprotected 'commercial speech' all but passed from the scene." *Id.*, 759. It emphasized that simply because an advertiser's interest was purely economic, he should not be disqualified from First Amendment protection and that a consumer's interest in advertising may be as important to him as his interest in some political issue. The court appeared to be putting commercial information on the same footing as political speech when it stated, at p. 765: "Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price." The free flow of commercial information is just as essential to society as any other type of information. However, the court concluded that it does not follow that commercial speech cannot be regulated in some manner when there is a compelling state's interest. False and misleading statements or untruthful speech are given no constitutional protection. Mr. Justice Rehnquist in the sole dissenting opinion, however, maintained that the amount of protection afforded "commercial speech" should still be balanced against other protected interests of the public.

The following year by *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977), the Supreme Court struck down an ordinance prohibiting the use of "For Sale" signs, stating that the ordinance inhibited communication between those who wished to sell or purchase. In this instance, the court found that there was no evidence that such signs would have a detrimental effect on the community. Therefore, it retained the balancing test and weighed the infringement upon the constitutional right of free speech against the harm done to the community by the placing of such signs. However, the court demanded (p. 92) that a strong state's interest be shown to justify restric-

tion on "'the free flow of commercial information.' Virginia Pharmacy Bd., supra, at 764."

In *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977), the First Amendment was held to be violated by a disciplinary rule which prohibited the advertising of legal services, as inhibiting the free flow of information, which would keep the public in ignorance of useful information, i.e., the price of certain routine legal services. Using the traditional balancing test, the court examined the reason for the rule and found there was not a compelling state's interest which justified the restraint of advertising by attorneys. However, it still reserved to the state the power to limit advertising which was false, misleading, or deceptive, "recogniz[ing] that many of the problems in defining the boundary between deceptive and nondeceptive advertising remain to be resolved." *Id.,* 384. According to that court, the very fact that an advertisement is truthful directly relates to the benefit to be gained by society from it. There is no tolerance for untruthfulness in commercial speech. Since the public has little knowledge concerning legal fees and services, any misstatement that might be considered unimportant in other circumstances would be considered of serious import in the legal arena and, therefore, would quickly lose First Amendment protection. In *Bates* the court set up a high standard of truthfulness and honesty at the risk of the loss of First Amendment protection.

In *National Commission on Egg Nutrition* v. *Federal Trade Commission,* 570 F.2d 157 (1977), the court addressed the issue of what influence false and misleading advertising had on the right to protection of commercial speech under the First Amendment. It upheld that Commission's order prohibiting advertisements which stated that eggs did not contribute to heart disease as being false and misleading. There was no evidence that eggs did not contribute to heart disease. The court, at p. 162, said "that the protection afforded to speech of any kind is to be determined by 'assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation.' Bigelow v. Virginia, supra, 421 U.S. at 826." The interests of both the speaker of the communication and that of society which receives it are protected

by the First Amendment. The target audience of commercial speech is the consumer. In that case the egg industry argued that it was expressing an opinion on a controversial issue, but the court found that the *advertisements were not opinion* (emphasis added) but rather denials significant to a segment of society. There the court balanced the harm that might be done by such misleading advertising against the encroachment on the right to free speech and found that the advertisements would be to the ultimate detriment of society.

The Supreme Court in *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978), reh. den. 438 U.S. 907 (1978), struck down a criminal statute which prohibited businesses from making financial payments in order to influence voting. The court stressed that even though a communication is paid for by a corporation rather than an individual, it is not automatically considered commercial speech. There was no evidence that the subject contributions had any material effect upon the corporation's business and so the court found that the communications financed were an expression of opinion and, therefore, political speech is allowable only when a compelling state's interest in shown. The effect of that statute in that instance would be to inhibit the free expression of a political point of view. In following its then well-established pattern, the court found that the political aspects substantially outweighed any personal gain to the corporation and, therefore, the action relating to the communications was afforded greater First Amendment protection. When the court examined what harm the community would suffer by its upholding the corporation's right to voice its views on political issues, it found that the communications would serve to educate and inform the public even if they might influence the outcome of the subject referendum voting; accordingly, there would be no justification for suppression. The purpose of the First Amendment is to encourage the expression of diverse views.

In the 1980 case of *Village of Schaumburg* v. *Citizens for a Better Environment,* 48 LW 4162 (Feb. 20, 1980), the court struck down an ordinance prohibiting door-to-door solicitation of contributions by charitable organizations that do not use at

least seventy-five percent of their receipts for "charitable purposes", excluding from such purposes payments by those organizations of salaries or commissions to solicitors and their administrative expenses. While recognizing that it is sometimes difficult to distinguish between commercial and political advertisements or solicitations, the court found that solicitations by charitable organizations were not commercial speech because they sought to inform the public on issues rather than seeking financial support for their own personal needs. In footnote 7 on p. 4165 the court points out that any prior decisions which excluded commercial speech were no longer to be considered good law. However, when applying First Amendment protection to an ordinance which encompasses both commercial speech and political speech, a distinction still existed in that political speech was entitled to greater protection. There would be times when the distinction between commercial and political speech was important. The court again used the balancing test which permits it to measure the harm done to the constitutional protection of commercial speech against the injury to society and held the ordinance to be unconstitutional.

In summary the Supreme Court since *Valentine*, supra, has retained the definition of "commercial speech" as an advertisement "to pursue gainful employment" or for "private profit". "Political speech" has been described as an advertisement which was informational or which concerned a "public protest". These definitions have not been altered by case law but at times it has been difficult to establish whether a particular advertisement was commercial or political speech because both elements were present. In those instances the court examined the intent of the advertising parties and if the publication was for some commercial benefit, it was held to be essentially commercial speech; if published for the purpose of expressing some opinion or point of view, it was considered essentially political.

III

In earlier cases it was essential to distinguish between "commercial speech" and "political speech" because courts afforded

greater protection to political speech. In the 1970s courts began to take the position that in many instances commercial speech was as valuable to the public as political speech because even if it resulted in financial gain for an individual, the communication itself served to keep the public informed. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, supra.

Three essential tests have developed in applying the constitutional standards to commercial-speech situations. The first test was set out in *Valentine* v. *Chrestensen*, supra, where the court balanced two fundamental interests: the state's interest in keeping highways safe and the individual's interest in the right to disseminate information which might be in the public interest. This simple balancing test allowed the court to decide which of those two interests—safety to society or freedom of speech—would be the most beneficial to society at large. The Supreme Court found that the state's interest was of greater weight on the balance scale.

The balancing test is affected by consideration of whether the essential purpose of the publication is political or commercial. The greater the political motivation, the more compelling the state's reason must be for infringement on First Amendment rights. *Murdock* v. *Pennsylvania*, supra. The same balancing yielded that result in *Breard* v. *Alexandria*, supra. There the court stressed that First Amendment protection was not absolute, especially when there was an encroachment on another fundamental right.

The second test, developed in *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, supra, emerged when the courts recognized that commercial speech was often of value to the public because it contained information valuable to it. This gave increased protection to commercial speech. *Bigelow* v. *Virginia*, supra. Pursuant to this test statutes prohibiting certain types of advertising were struck down even though the advertisements were clearly for financial gain. The courts postulated that the effect of these statutes was to prevent information from being made available to the public. *Bates* v. *State Bar*

of Arizona, supra. This test required that more than mere infringement on another fundamental right be shown. Thus, commercial speech was on an almost equal footing with political speech: an interference with a compelling state's interest had to be shown before commercial speech could be limited or prohibited.

A third test was developed in *National Commission on Egg Nutrition* v. *Federal Trade Commission*, supra. There the advertisement—commercial speech—was false and misleading. The court reasoned that since false and misleading information does not serve the public, and, in fact, may often be detrimental to society, this type of commercial speech was afforded very little protection: the harm caused by the deception was greater than the harm caused by the infringement.

In the instant case, the court is unable to balance the competing interests based on what has been submitted to it. Sufficient evidence must still be presented toward determination of the issues. This need is underlined by the realization that motivation of the defendant-advertisers is a necessary determination preliminary to categorization of the advertising as political or commercial speech.

Even if it were conceded that commercial speech is entitled to protection, under the more recent court decisions evidence is required to determine whether there is a compelling state's interest which may justify placing some limits on this type of advertising.

Crucially, there is no evidence before this court to demonstrate whether the advertising is false and misleading as alleged by the plaintiffs. Should facts be presented which demonstrate that the advertisements in question are false and/or misleading, this court would be unable to find the advertisements entitled to constitutional protection.

IV

This court is fully aware of, and has examined in detail, the many federal decisions which seem to hold a position contrary to that enunciated here. Even after such review, this court is

unable to agree that the issues are patent enough for resolution on a motion to strike. It is clear that the law does not, and should not, say that any and all speech is entitled to complete constitutional protection. The exceptions to the right to complete protection definitively include compelling state's interests and items which are false or misleading. Despite other court rulings, this court is unable and unwilling to resolve the question whether the speech in this action does or does not fall within an exception without the presentation of further evidence.

V

The defendants allege, on various grounds, that the statutory claims in the first and second counts of the plaintiffs' complaint are either misdirected or without merit.

Defendants rely, in the first instance, on the argument that the statutory provisions do not apply to insurance companies. This contention cannot be accepted by this court. This court does, however, accept the reasoning set forth in the case of *Stone* v. *Government Employees Ins. Company, Washington, D.C. (GEICO)*, No. 04 19 50, Superior Court, Judicial District of Fairfield (Stamford), May 21, 1980, wherein Cioffi, J., stated at pp. 3, 4:

> "First, insurance cases are not included among the exceptions in 42-110c, nor is the remedy limited in Sections 32-60 solely to that statute. Second, unfair trade practices prohibited in 42-110b certainly seem to encompass those set forth in Sections 38-61. Finally, although administrative remedies exist in 42-110d and 38-62 to be enforced by the respective commissioners, there is no indication that a person must, as a prerequisite use that route, since 42-110g and h allow private actions."

The legislature could have, and would have, clearly exempted insurance companies if it is saw fit to do so; however, the legislature provided that the Unfair Trade Practices Act applied to "any person", not to some selected persons.

The defendants' next line of argument claims that Connecticut's Unfair Trade Practices Act (hereinafter referred to as "CUTPA") applies only to direct loans or sales. This is patently not the case. By a technical amendment, P.A. 79-210, the legislature made clear that this was not the intent. CUTPA is a remedial Act and, therefore, must be construed liberally. To adopt defendants' position that no cause of action can arise under CUTPA until the amount of the loss is known is not a liberal reading. However, dispositive of this argument is this court's holding that whether there is or is not a specific loss and whether any loss, if there be one, is or is not known, are clearly issues to be determined by the trier of the facts and are not appropriate for resolution on a motion to strike.

VI

The constitutionality of CUTPA is not an issue to be resolved on a motion to strike. Connecticut's Supreme Court has repeatedly noted that to determine the constitutionality of a statute the factual circumstances of application may bear heavily on the determination. See, e.g., *State* v. *Doe*, 149 Conn. 216, 230. The party attacking the constitutionality of a statute must overcome a presumption of validity and prove unconstitutionality beyond a reasonable doubt. See, e.g., *Engle* v. *Personnel Appeal Board*, 175 Conn. 127, 134. It is difficult for this court to envision a set of circumstances under which this burden of proof could be met on a motion to strike. Clearly, that burden has not been met by the instant motions to strike.

VII

The effect of ruling on motions to strike is unclear.

> "Prior to 1978 there was an express rule that a party had the right to plead over if his demurrer was overruled. That rule was repealed in 1978 when the motion to strike replaced the demurrer, but the rule was not replaced with a comparable rule pertaining to overruled motions to strike. This failure of the new rules to cover the situation raises

> the question whether a right to plead over exists now or not. On the one hand, the repeal of an express provision without the enactment of an analogous provision would seem a conscious elimination of the right to plead over. On the other hand, it could be argued that the elimination of the old rule resurrected the preexisting Connecticut common law which permitted pleading over without an express rule to that effect."

Stephenson, 1 Conn. Civ. Proc. (2d ed.), 1979 Cum. Supp., § 119, pp. S86-S89. This court adopts the second analysis. The right to plead over is fair and, more importantly, consistent with modern-day practice which aims at eliminating the "sporting theory" of justice. It would not serve the ends of justice to place the party moving to strike at peril because the motion failed on one point of many in issue.

For the above reasons, all of the captioned motions to strike are hereby denied.

BURTON J. JACOBSON, J.
Burton J. Jacobson

Appendix B

Orders of the Supreme Court of Connecticut Denying Appellant's Application for Permission To Appeal

SUPREME COURT
STATE OF CONNECTICUT

June 18, 1981

No. 10850, 10851

LINDA YOUNG, et als.

vs.

CRUM & FORSTER, et als.

ORDER

THE DEFENDANT'S MOTION FOR PERMISSION TO FILE INTERLOCUTORY APPEAL FROM A RULING ON MOTION TO STRIKE PURSUANT TO PRACTICE BOOK SECTION 3164 AND § 52-265 (a) OF THE CONNECTICUT GENERAL STATUTES HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

By The Court

DONALD H. DOWLING
Chief Clerk

Notice

Koskoff, Koskoff & Bieder
Day, Berry & Howard
Cotter, Cotter & Sohon
Robinson, Robinson & Cole
Zeldes, Needle & Cooper

June 22, 1981

B-2

SUPREME COURT
STATE OF CONNECTICUT

June 18, 1981

No. 10850, 10851

LINDA YOUNG, et als.

vs.

CRUM & FORSTER, et als.

ORDER

THE DEFENDANT'S MOTION FOR AN EXPEDITED APPEAL HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

By The Court

DONALD H. DOWLING
Chief Clerk

Notice

Koskoff, Koskoff & Bieder
Day, Berry & Howard
Cotter, Cotter & Sohon
Robinson, Robinson & Cole
Zeldes, Needle & Cooper

June 22, 1981

Appendix C

Notice of Appeal

IN THE
SUPERIOR COURT
OF THE STATE OF CONNECTICUT
Judicial District of Fairfield at Bridgeport
No. 168946

Filed
September 11, 1981
Office of the Clerk
Superior Court

LINDA YOUNG, et al.,

Plaintiffs,

—against—

CRUM AND FORSTER, THE NORTH RIVER INSURANCE COMPANY, AETNA LIFE AND CASUALTY COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, THE TRAVELERS INSURANCE COMPANY,

Defendants

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that defendants Crum and Forster, The North River Insurance Company, Aetna Life and Casualty Company, St. Paul Fire and Marine Insurance Company and The Travelers Insurance Company hereby appeal to the Supreme Court of the United States from the judgment of the Superior Court of the State of Connecticut, Judicial District of Fairfield at Bridgeport, denying defendants' motions to strike the complaint herein, entered in this action on May 26, 1981.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

Dated: Bridgeport, Connecticut
September 11, 1981

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PROOF OF SERVICE

This is to certify that a copy of the foregoing Notice of Appeal was sent, postage prepaid, to:

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Dated this 11th day of September, 1981.

S/ DION W. MOORE
Dion W. Moore
Commissioner of the
Supreme Court

Appendix D
Appellants' Statements

Too bad judges can't read this to a jury.

In a small Florida town, a decorative boulder rests on the median of a road. A man with three drinks in him and no sleep for 18 hours smashes his car headlong into it. *A jury orders the town to pay him $4.7 million in damages.*

A truck without brake lights is hit from behind. For

"psychic damages" to the driver, because his pride was hurt when his wife had to work, *a jury awards $480,000 above and beyond his medical bills and wage losses.*

Then there's the one...but *you* can probably provide the next example. Most of us know hair-raising stories of windfall awards won in court.[2] Justified claims should be compensated, of course. Ætna's point is that it is time to look hard at what windfall awards are costing.[3]

What can we do? Several things:

We can stop assessing "liability" where there really *was* no fault—and express our sympathy for victims through other means.

We can ask juries to take into account a victim's *own* responsibility for his losses. And we can urge that awards realistically reflect the actual loss suffered—that they be a fair *compensation,* but not a reward.[4]

Insurers, lawyers, judges—each of us shares some blame for this mess. But it is you, the public, who can best begin to clean it up. Don't underestimate your own influence. Use it, as we are trying to use ours.

Ætna wants insurance to be affordable.

[1] This case is being appealed by the town. In addition to the court-awarded damages, two other defendants (the contractor and the county) settled out of court for an additional $1.15 million. This illustrates how extravagant jury-awarded damages set a standard for extravagant out-of-court settlements—the real problem, since most liability cases are settled out of court.

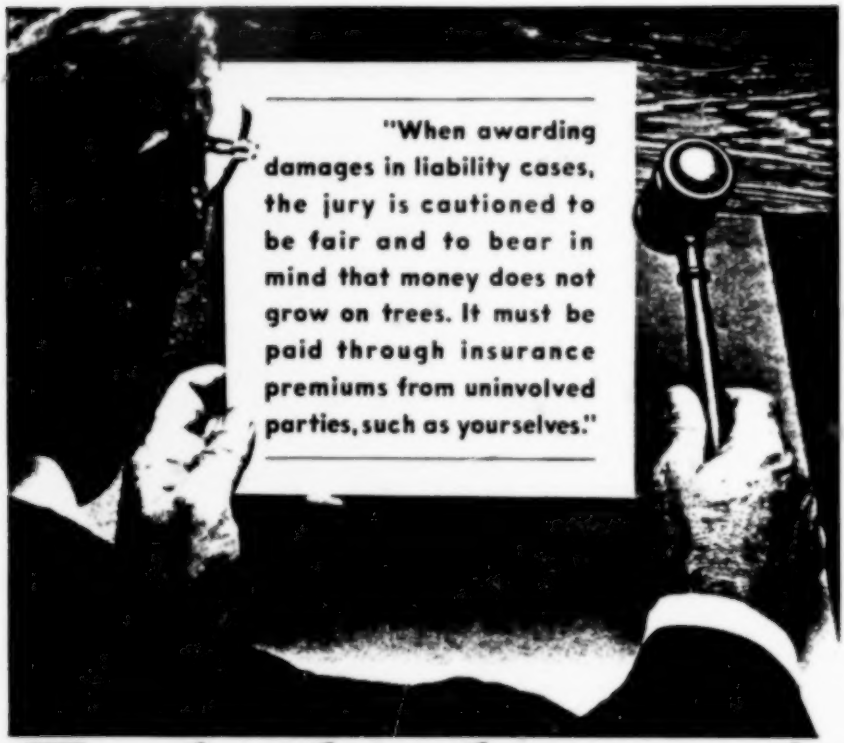
[2] A by-product of such awards has been a quantum leap in the number of all kinds of suits filed. Products liability cases alone have increased from 50,000 a year in the 1960's to almost a million a year now.

[3] Most awards are paid by insurance, and insurance companies spend millions more defending policyholders against lawsuits. The direct result is rising premiums for automobile and other liability coverages. The indirect result is higher prices for goods and services—prices which are boosted to cover the skyrocketing insurance premiums of manufacturers, doctors, hospitals, and others who are targets for windfall awards.

[4] For example, it would help if juries were simply required to take into account payments the claimant has already received for medical bills and lost wages. Under the present system, these bills may be paid all over again.

Further information may be obtained by contacting Henry L. Savage, Jr., Public Relations, Ætna Life & Casualty, 151 Farmington Avenue, Hartford, CT 06156. Telephone (203) 273-6545.

Ætna
LIFE & CASUALTY



Too bad judges can't read this to a jury.

A truck without brake lights is hit from behind. For "psychic damages" to the driver, because his pride was hurt when his wife had to work, *a jury awards $480,000 above and beyond his medical bills and wage losses.*

A 67-year old factory worker loses an arm on the job. His lawyer argues that he should receive wages for all the

remaining years of his life expectancy. He had been earning about $10,000 a year. The jury awards him a sum equal to almost $89,000 a year.[1]

Then there's the one...but *you* can probably provide the next example. Most of us know hair-raising stories of windfall awards won in court.[2] Justified claims should be compensated, of course. Ætna's point is that it is time to look hard at what windfall awards are costing.[3]

What can we do? Several things:

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Insurers, lawyers, judges—each of us shares some blame for this mess. But it is you, the public, who can best begin to clean it up. Don't underestimate your own influence. Use it, as we are trying to use ours.

Ætna wants insurance to be affordable.

[1] The man was awarded $1,250,000, or about $89,000 a year, for the remaining 14 years of his life expectancy. The jury awarded an extra $500,000 to his wife for loss of "consortium" —the company, affection and services of her husband.

[2] A by-product of such awards has been a quantum leap in the number of personal injury and property damage suits filed. A 1977 study in California shows such suits increasing at *five times the rate of population growth.*

[3] Most awards are paid by insurance, and insurance companies spend millions more defending policyholders against lawsuits. The direct result is rising premiums for automobile and other liability coverages. The indirect result is higher prices for goods and services—prices which are boosted to cover the skyrocketing insurance premiums of manufacturers, doctors, hospitals, and others who are targets for windfall awards.

[4] For example, it would help if juries were simply required to take into account payments the claimant has already received for medical bills and lost wages. Under the present system, these bills may be paid all over again.

Ætna Life & Casualty
151 Farmington Avenue
Hartford, CT 06156

Ætna
LIFE & CASUALTY

"And now, the big winners in today's lawsuits..."

Is this where we're headed? At least 205 Americans have now won damage suits worth a million dollars or more.

In 1962 there was *one;* the next year, *two;* and as recently as 1969, only *three.* But by 1976 the number of million-dollar plus awards ballooned to *43.* The stakes have gone up.

Were these awards justified by real losses and clear fault? Or were they grand prizes in a lucrative game of chance

—America's dis-tort-ed tort law system?[2]

We've reached the point where a person was actually awarded well over a million dollars for "traumatic neurosis" resulting from a false arrest for shoplifting.[3]

If there were no losers in this game, we might dismiss it as harmless fun, like a lottery. But every payer of liability insurance premiums *is* a loser.[4] And indirectly all of us lose, as the soaring costs of settlements and insurance force up the prices of the products and services we use.

Justified claims should be fairly compensated. But it's time to look at state laws that permit exc ssive and unwarranted awards. California has done so h a citizens' commission created to help bring balance back to the system. We urge other states to follow.

Insurers, lawyers, judges—all of us share some blame for this mess. But it is you, the public, who can best begin to clean it up—by making your views known to your elected representatives. Don't underestimate your own influence. Use it, as we are trying to use ours.

Ætna wants insurance to be affordable.

[1]Jury Verdict Research Inc. of Cleveland, Ohio, keeps records of million-dollar-plus awards. These, however, are only the tip of the iceberg. Extravagant jury-awarded damages set a standard for *out-of-court* settlements – the real problem, since most liability cases *are* settled out of court.

[2]A "tort," strictly speaking, is a wrongful act (other than breach of contract) for which damages may be recovered in court.

[3]In this case, a 23-year-old woman was arrested, tried, and found innocent of shoplifting. In turn, she sued the store and its special policeman. To compensate her for "depression, anxiety, nervousness, phobia, fears, and nightmares," the jury awarded her $1,100,000 in damages. In the past, awards for such intangible damages were reasonably related to actual medical expenses and economic losses. Today, these vague terms are often the basis for huge demands. We have recently seen the filing of a $31-million malpractice suit on the grounds of "mental distress."

[4]Most awards are paid by insurance and any continuing increase in the size or number of awards must be reflected in insurance costs. For example, product liability insurance for manufacturers, and malpractice insurance for physicians, more than *doubled* in one recent 12-month period. While these were averages country-wide, for many the increases were even more severe. In California recommended increases for product liability protection for clothing manufacturers *ranged 400%* in 1976, while malpractice insurance for some physicians increased 347%.

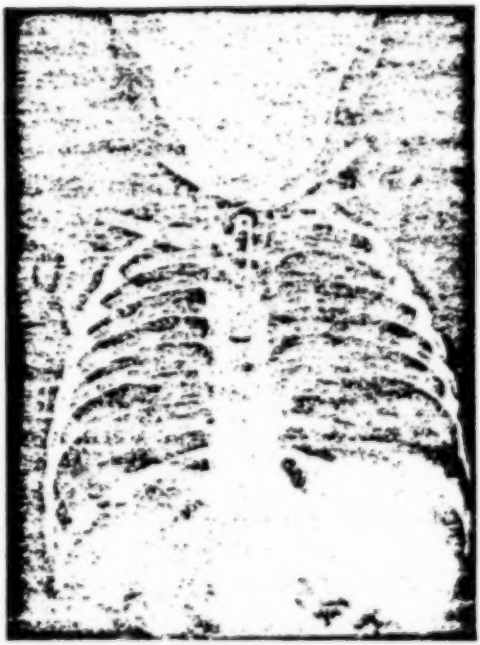
Ætna Life & Casualty
151 Farmington Avenue
Hartford, CT 06156

Ætna
LIFE & CASUALTY

There isn't a product made that can't be misused.

Even a safety pin manufacturer may not be safe today from misuse of his product. More than ever before, manufacturers and sellers are being held responsible by the courts for product-related injuries–even when the victims contribute to their own injuries.

A man who lifted a rotary lawn mower to cut hedges injured himself. He sued the lawn mower manufacturer and won. The manufacturer of a bench saw made in 1942 with the necessary safety equipment was ordered to pay $50,000 to a worker injured using the machine in 1971. The award was made despite testimony that a dealer rebuilt the machine without a guard.



In 1976 an estimated one million product liability claims were filed. And, in a recent eight-year period, the average award rose by 567% from $12,000 to $80,000. That's not pin money.

Some huge awards have actually caused plants to close and many people to lose their jobs. And the problem could get much worse.

More claims and higher awards mean, of course, higher insurance premiums.

Insurance, after all, is simply a means of spreading risk. Insurance companies collect premiums from many people and compensate those who have losses.

The price of insurance must reflect the costs of paying for those losses and the expenses of handling them.

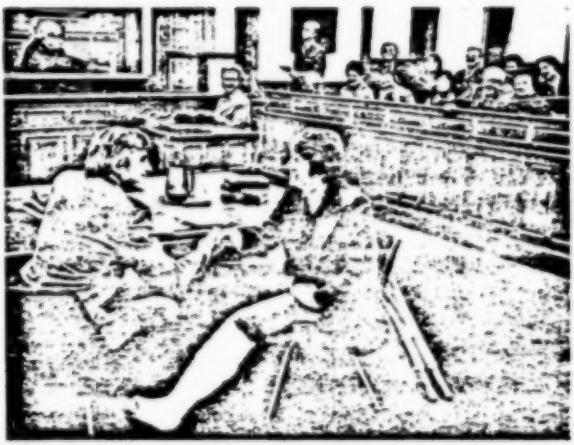
No one likes higher prices. But we're telling it straight.

INDUSTRIAL INDEMNITY
one of the
CRUM & FORSTER INSURANCE COMPANIES

THE POLICY MAKERS.

Industrial Indemnity Home Office: San Francisco 94120

The jury smiled when they made the award. They didn't know it was coming out of their own pockets.



They thought they were giving away the insurance company's money.

So it wouldn't hurt to be generous.

Because insurance companies can afford to pay big awards. All they have to do is collect higher insurance premiums.

From you.

And excessive awards eventually cost you money.

We don't object to paying fair awards. That's our business. But paying exaggerated awards inflates costs.

And can affect your insurance in other ways. Insurance companies might be forced to limit the kinds of coverage or the number of policies they write.

Insurance, after all, is simply a means of spreading risk. Insurance companies collect premiums from many people and compensate the few who have losses.

The price of insurance must reflect the rising cost of compensating those losses and the work that goes into doing that.

And that includes the escalation in jury awards.

That's why your premiums have been going up.

No one likes higher prices. But we're telling it straight.

CRUM & FORSTER INSURANCE COMPANIES

THE POLICY MAKERS.

What's a broken nose worth today?

If you were responsible for his injury, it could cost a lot more money than you'd like to think about.

Of course, there will be bills to cover the high costs of medicine, doctors, and hospitalization. There also may be substantial legal fees.

And then there is the question of whether an award is to be made for pain and suffering above and beyond medical costs. And if so, how much.

Fortunately, you have liability insurance. But because the costs of what it covers have been rising, your premiums have been rising, too.

Insurance, after all, is simply a means of spreading risk. Insurance companies collect premiums from many people and compensate the few who have losses.

The price of insurance must reflect the costs of paying for those losses and the expenses of handling them.

No one likes higher prices. But we're telling it straight.

CRUM & FORSTER INSURANCE COMPANIES

THE POLICY MAKERS.

Administrative Headquarters: Morris Township, New Jersey 07960

"These days, you could go broke if you're sued for a broken leg."

Thomas E. Hays, *Independent Insurance Agent*
United Agencies, Inc., Los Angeles/Pasadena, California

Recently there's been a tremendous increase in the size of settlements awarded to claimants in liability cases.

This means your liability coverage may no longer be enough to properly cover you. And if you were sued, you might have to pay part of the settlement yourself.

Independent insurance agents and brokers are insurance professionals who are especially qualified to reevaluate your coverage. They represent many insurance companies, not just one. So they can choose coverages from many insurance companies and can objectively recommend the coverage that best meets your individual needs.

Also remember, an independent agent is a man who's running his own business. And doesn't it make sense that he'll do more to make sure you get the best coverage? After all, without your business he's out of business.

So speak to an independent insurance agent or broker in your community and make sure you have the insurance you need to keep yourself fully protected. It may cost you a little more now, but it could save you a lot more later.

INDUSTRIAL INDEMNITY
one of the
CRUM & FORSTER INSURANCE COMPANIES
THE POLICY MAKERS.

Many people just won't use products right.

Guess who pays for their injuries.

We *all* do. In the form of higher prices for the products we buy.

Why? Because manufacturers and sellers of products are being besieged by product liability suits, many stemming from improper or careless use of products.

The total number of suits has soared. And the average settlement is 200 percent larger than it was 5 years ago.

This sue-somebody syndrome has pushed the cost of product liability insurance to record levels.

All of us help manufacturers and sellers meet their soaring product liability insurance costs by paying more for their products. Sometimes, a lot more.

So what's to be done?

On the one hand, the public certainly has a right to reasonable protection against injury and damage from faulty products.

On the other hand, it is impossible for manufacturers and sellers to anticipate every misuse.

Should manufacturers and sellers be held liable even when products are misused? Or, should greater responsibility be placed on consumers to use products properly, with reasonable care?

Furthermore, manufacturers are being sued as long as 40 years after products leave their plants. Even when products are altered by others and made unsafe.

Should manufacturers continue to be held liable forever? Or, should time limits be established?

These are not easy questions.

But we at The St. Paul feel the public must answer them.

How can you participate in making these decisions?

Send for our "Enough is Enough" consumer booklet. It's full of information on the causes and the pro's and con's of some possible cures for high insurance rates. You'll find out how to register your views where they'll count. Along with some tips on how you can hold down your own insurance costs.

Then get involved. Support the action you want taken.

Write a letter to your legislators. Be heard.

Or you can just do nothing and figure the problem will go away. Of course, if it doesn't, better keep your checkbook handy.

Enough is Enough

Write The St. Paul for your Enough is Enough booklet. Or contact an Independent Agent or broker representing The St. Paul. He's in this with you and wants to help. You'll find him in the Yellow Pages.

St. Paul Fire and Marine Insurance Company, 385 Washington St., Saint Paul, MN 55102.

The St Paul
Property & Liability Insurance

Serving you through Independent Agents. St. Paul Fire and Marine Insurance Company. St. Paul Mercury Insurance Company. The St. Paul Insurance Company. St. Paul Guardian Insurance Company. The St. Paul Insurance Company of Illinois. Property and Liability Affiliates of The St. Paul Companies Inc. Saint Paul, Minnesota 55102

25848 Ed. 3-77 Printed in U.S.A.

You really think it's the insurance company that's paying for all those large jury awards?

"Sue thy Neighbor" is fast becoming one of America's favorite pastimes. But who really foots the bill on the "big pot" some lucky claimant wins? We *all* do.

Insurance is basically a system for sharing risk among many.

All of us chip in so there'll be money available when somebody gets hit with a loss. Rates are based on expected claims.

Most claims have a reasonable basis and are settled fairly. But many people feel that an increasing number of jury awards are excessive. When awards are out of line, everyone pays more. In the form of higher insurance rates.

Frankly, unless something is done, this could go on forever. As long as you're willing to pay these higher costs, insurance companies can pay out bigger and bigger awards.

But we at The St. Paul feel the trend toward excessive jury awards has pushed insurance premiums to levels that are too high.

What can you do if you've had enough?

Send for our "Enough is Enough" consumer booklet. It's full of information on the causes and the pro's and con's of some possible cures for high insurance rates. You'll find out how to register your views where they'll count. Along with some tips on how you can hold down your own insurance costs.

Then get involved. Support the action you want taken.

Write a letter to your legislators. Be heard.

Or you can just do nothing and figure the problem will go away. Of course if it doesn't, better keep your checkbook handy.

Enough is Enough

Write The St. Paul for your Enough is Enough booklet. Or contact an Independent Agent or broker representing The St. Paul. He's in this with you and wants to help. You'll find him in the Yellow Pages.

St. Paul Fire and Marine Insurance Company, 385 Washington St., Saint Paul, MN 55102.

The St Paul
Property & Liability Insurance

Serving you through Independent Agents. St. Paul Fire and Marine Insurance Company. St. Paul Mercury Insurance Company. The St. Paul Insurance Company. St. Paul Guardian Insurance Company. The St. Paul Insurance Company of Illinois. Property and Liability Affiliates of The St. Paul Companies Inc., Saint Paul, Minnesota 55102

25849 Ed. 3-77 Printed in U.S.A.

"When anything goes wrong for me... somebody is going to pay!"

"They owe me!"

So who is this "somebody?"

It's "somebody" with plenty of money, an unending ability to pay.

This "somebody" has the responsibility to provide an extra *reward* to a person for his misfortune.

And "somebody" makes it easy for us as jurors (and even the judges) to overlook just who it is that's wrong, and base our decisions on the assumption that *any* injury or loss (real or imaginary) deserves payment. And maybe a substantial bonus as well.

So who is this benevolent "somebody?" It's *you!*

This growing "they-owe-it-to-me" attitude may be just fine with you. But if you want it to be America's standard, be prepared to pay the bill. In the form of higher taxes, higher prices for goods and services, higher medical costs. And, yes, higher insurance rates. So, keep your checkbook handy.

Because insurance is merely a means of spreading risk among many. So,when claims and settlements go up, rates can only do the same.

This complex social issue and its impact on insurance rates cannot be resolved without an informed public. Since you are the ultimate paying party, you most certainly have the right to be informed.

If that's your wish, send for our "Enough is Enough" booklet. It's full of information on the issue, along with action steps to help you register your views where they count.

Enough is Enough.

Write The St. Paul for your "Enough is Enough" booklet. Or contact an Independent Agent or broker representing The St. Paul. He's in this, too, and wants to help. You'll find him listed in the Yellow Pages.

St. Paul Fire and Marine Insurance Company, 385 Washington St., Saint Paul, MN 55102.

The St Paul
Property & Liability Insurance

Serving you through Independent Agents. St. Paul Fire and Marine Insurance Company, St. Paul Mercury Insurance Company, The St. Paul Insurance Company, St. Paul Guardian Insurance Company, The St. Paul Insurance Company of Illinois. Property and Liability Affiliates of The St. Paul Companies, Inc., Saint Paul, Minnesota 55102.

28382 Ed. 9-77 Printed in U.S.A.

We think it's time and not just our rates.

We see a growing set of circumstances that is having a potentially disastrous effect not only on the insurance industry but on every person in American society. Liability losses in both personal and business areas have moved steadily and rapidly upward until rates have gone beyond the reach of many people. And the cost of paying ever larger and more numerous losses results in higher prices for many of the goods and services that you buy.

Here are some examples of situations that you pay for.

In many parts of the country the cost of a hospital room (not including doctors, special nurses and medicine) is approaching $200 per day.

A $4,438 automobile costs $19,979 when bought part by part as your repair shop must do, according to the Journal of American Insurance.

In some parts of the country the burning of automobiles in order to collect insurance has reached near-epidemic proportions.

In the area of medical malpractice suits, in one state, ten times as many million-dollar awards have been made since 1970 as in all the years before. (You may want to go over that one again.) The growing volume of such suits is adding more than $3 billion to the nation's annual cost of health care, according to HEW.

During a recent five-year period the average claim settlement in product liability cases has increased by 300%. The resultant astronomical liability protection costs have put some manufacturing companies out of business and threaten still others.

Despite higher premiums, the insurance industry, last year alone, had an underwriting loss of over $4 billion in casualty-property lines.

These are only the direct costs and their effects. The indirect effects hit every one of us, in the form of higher product prices higher costs for health care, unavailability of needed goods and services, in hundreds of ways, in every sector of our lives.

The next manufactured

EXHIBIT H

we raised our voice

product you buy may cost many dollars more because the manufacturer's liability protection costs shot up. Further, these are dollars that might have gone for engineering improvements that could have lengthened its life.

Or your doctor bills. In many cases they've gone up because of rising malpractice premiums. And there are indications they'll go even higher as doctors are forced to turn more and more to the practice of "defensive" medicine. That is, taking X rays, ordering diagnostic tests, etc., etc., etc., when there may be little recognized medical need for them.

Who's at fault? We're all at fault. How else could it happen?

But that isn't the point. The point is, none of us can go on pretending it isn't happening.

Is it hopeless? We don't think so. In fact, all indications are that this country is stirring itself awake. And we intend to continue to raise our voice on these matters. Because the more you know about the problems, the more likely we can all work together toward effective solutions.

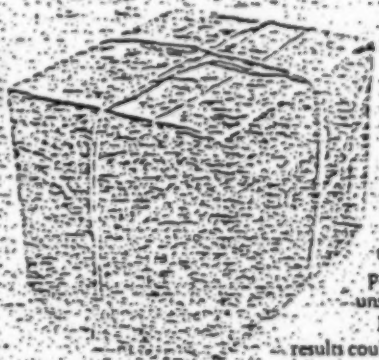
We're working with government agencies, industry associations, and private companies to do what we can to solve these problems. But we need your help. We'd like to know what you think and how you feel about insurance-related problems. And we'll share our ideas on these issues with you. Just drop a letter to our Office of Consumer Information, One Tower Square, Hartford, Conn. 06115.

Then maybe you won't just blame your insurance company and your agent. You'll raise your voice, too, by talking to your neighbors and friends, writing your representatives in government and contacting your insurance commissioner.

THE TRAVELERS

Product liability is like a box that's ticking.

We don't know what's inside, a clock or a time bomb.



Not that long ago, product liability was just another form of insurance coverage. Something a manufacturer turned to on those rare occasions when somebody got hurt using his product.

Then, almost imperceptibly at first, some curious things began to happen.

Product liability cases, which in the early 1960's were running at a fairly predictable rate, began to increase at an unstable pace.

If these trends continue unchecked, the results could prove disastrous. Not just for people who make products, but for people who buy them.

That's us. All of us.

Already, the prices of many goods and services have begun to escalate because of the need for additional product liability protection. Some manufacturers are even reluctant to introduce new, improved products. Indeed, there have already been cases where the "new, improved" label was cited as evidence of the older product's deficiency.

Why are we telling you this? Because we all stand a better chance of solving these problems if we understand what it is we're dealing with. We'd like to know what you're thinking and we'd be happy to share our ideas with you. Just drop a letter to our Office of Consumer Information, One Tower Square, Hartford, Conn. 06115.

Although product liability is still a potential, rather than an actual, problem, it's something that should concern all of us. Because the symptoms are there. And if the day arrives when we find that product liability is, in fact, a crisis, it may be too late for a solution.

Tick, tick, tick.

THE TRAVELERS

The Travelers Indemnity Company, and Affiliated Companies, Hartford, Conn. 06115.

NO-FAULT IS TOO GOOD AN IDEA NOT TO IMPROVE UPON IT.

No-fault was the first real innovation in the sticky field of settling automobile claims.

The people liked it; we liked it; the Department of Transportation liked it.

Each state (16 at latest count containing 60% of all insured vehicles) that adopted it varied the rules according to its local needs.

And that worked out for the best, too.

If something could be done to make no-fault better, most people agree that it's in raising the no-fault limit.

What with inflation, and rising costs in general, a higher threshold would mean more claims would be settled more quickly. And possibly reduce costs for everyone.

What do you think? We at The Travelers would like to know. Just write our Office of Consumer Information, One Tower Square, Hartford, Conn. 06115. Or dial, toll-free, 800-243-0191. In Connecticut, call collect, 277-6565.

THE TRAVELERS

Raising our voice, not just our rates.

The Travelers Insurance Company, The Travelers Indemnity Company, and Affiliated Companies, Hartford, Conn. 06115.

Appendix E

Complaint

TO THE SHERIFF OF THE COUNTY OF HARTFORD, HIS DEPUTY, OR EITHER CONSTABLE OF THE CITY OF HARTFORD, WITHIN SAID COUNTY,

GREETING:

BY AUTHORITY OF THE STATE OF CONNECTICUT, you are hereby commanded to summon CRUM AND FORSTER, NORTH RIVER INSURANCE COMPANY, AETNA LIFE AND CASUALTY COMPANY, ST. PAUL COMPANIES, INC., TRAVELERS INSURANCE COMPANY and D'ARCY, MCMANUS AND MASIUS to appear before the Superior Court, to be held at Bridgeport, within and for the County of Fairfield on the First Tuesday of March, 1978, said appearances to be made by the said CRUM AND FORSTER, NORTH RIVER INSURANCE COMPANY, AETNA LIFE AND CASUALTY COMPANY, ST. PAUL COMPANIES, INC., TRAVELERS INSURANCE COMPANY and D'ARCY, MCMANUS AND MASIUS or their attorney by filing a written statement of appearance with the Clerk of said court on or before the second day following said return date, then and there to answer unto:

LINDA YOUNG of Ellington, Connecticut, KAREN CAWLEY of Guilford, Connecticut, TERRY DUGAY of Danbury, Connecticut and KEVIN NAYLOR of Stratford, Connecticut, in a civil action wherein the plaintiffs complain and say:

FIRST COUNT:

1.) The plaintiff, LINDA YOUNG, a former Miss Connecticut contestant, is a resident of the State of Connecticut. On or about July 18, 1972, an automobile smashed into a motorcycle on which she was a passenger causing her painful and permanent injuries necessitating amputation of her leg.

2.) LINDA YOUNG brought a lawsuit as a result of that collision. That case is now pending before the Superior Court, Tol-

land County as Docket Number 016928 and LINDA YOUNG has requested a jury trial.

3.) The plaintiff, KAREN CAWLEY, a widow with three children, is a resident of the State of Connecticut and sues as the administratrix of the estate of her deceased husband, Raymond, who died by incineration at the age of 27 when the gas tank of his car ignited after a collision.

4.) KAREN CAWLEY, as administratrix brought a lawsuit as a result of that death. That case in now pending before the Superior Court, New Haven County as Docket Number 156064 and KAREN CAWLEY has requested a jury trial.

5.) The plaintiff, TERRY DUGAY, is a resident of the State of Connecticut, and on or about October 10, 1975, he suffered a serious injury leading to a fusion of his ankle and permanent disability when a car, in which he was a passenger, collided with a telephone pole.

6.) TERRY DUGAY brought a lawsuit as a result of that collision. That case in now pending before the Superior Court, Fairfield County at Bridgeport as Docket Number 161085 and TERRY DUGAY has requested a jury trial.

7.) The plaintiff, KEVIN NAYLOR, is a resident of the State of Connecticut, and on or about August 20, 1973, a car collided into a bicycle he was riding causing him painful injuries necessitating several operations and eventual removal of his spleen.

8.) KEVIN NAYLOR brought a lawsuit as a result of that collision. That case in now pending before the Superior Court, Fairfield County at Bridgeport as Docket Number 158279 and KEVIN NAYLOR has requested a jury trial.

9.) The plaintiffs represent that class of people who are plaintiffs in civil suits currently pending in the Superior Courts of the State of Connecticut in Tolland, Fairfield and New Haven Counties, in which cases allegations are made that a defendant or defendants, engaged in some act or action which caused personal injury to such members of the plaintiff class,

which cases have been claimed for a jury trial. The class is so numerous that joinder of all members is impractical. There are questions of law and of fact common to the class and the representative parties will fairly and adequately protect the interests of the class.

10.) The defendant, CRUM AND FORSTER, is a company with administrative headquarters in the State of New Jersey, engaged in the writing of casualty and other insurance, which advertises and does business in the State of Connecticut via one or more of their subsidiaries, among whom is the defendant, NORTH RIVER INSURANCE COMPANY.

11.) The defendant, AETNA LIFE AND CASUALTY COMPANY, is a corporation incorporated in the State of Connecticut with its principal place of business in Hartford, Connecticut, engaged in the writing of casualty and other insurance, which advertises and does business in the State of Connecticut and other states.

12.) The defendant, ST. PAUL COMPANIES, INC., and its affiliates are a corporation incorporated in the State of Minnesota with its principal place of business in St. Paul, Minnesota, engaged in the writing of casualty and other insurance, which advertises and does business in the State of Connecticut.

13.) The defendant, TRAVELERS INSURANCE COMPANY and affiliated companies is a corporation incorporated in the State of Connecticut with its principal place of business in Hartford, Connecticut, engaged in the writing of casualty and other insurance, which advertises and does business in the State of Connecticut and other states.

14.) The defendant, D'ARCY, MCMANUS AND MASIUS, is a corporation incorporated in the State of Delaware with its principal place of business in New York, New York, engaged in the business of advertising and which does business in the State of Connecticut.

15.) The defendant, CRUM AND FORSTER, beginning in or about 1976, and continuing to the present, made, published,

disseminated and placed before the public in newspapers, magazines and other publications, statements/advertisements in Connecticut and other states, examples of which are attached hereto as Exhibits A, B, C and D and are incorporated and made a part hereof.

16.) Said statements/advertisements, as set forth are unfair, deceptive and/or misleading, and contain (in whole or part) lies and untruths, among which are the following.

A.) As to Exhibit A

1.) The photo and text suggest there exists a products liability case where a verdict was rendered against a manufacturer of safety pins because the pin was swallowed by a young person and on information and belief no such case exists.

2.) The text recites as fact, that a plaintiff recovered damages in a case where he used his rotary mower as a hedgeclipper; that story is a complete fabrication.

3.) The texts allegation that one million products liability suits are filed annually is a lie.

4.) Statistics are cited in the text without any source.

5.) No statistics are cited for the allegation that huge awards have closed businesses, probably because that allegation is a lie or deceptively overstated.

6.) The text implies that one who misuses a product can still recover in a lawsuit when the law is clear that misuse prevents any recovery at all.

B.) As to Exhibit B

1.) The photo suggests that the scene depicted is an actual scene, when in reality the judges and juries in Connecticut and elsewhere treat cases seriously and in no way do their actions resemble those depicted in the photo.

2.) The text implies that there are excessive final awards and in fact the defendant can point to none; the text fails to disclose the elaborate legal structure for insuring that any final jury award is not excessive.

3.) The text cunningly asks jurors to place their own alleged pecuniary interest above their oaths as juror/citizens.

4.) The text implies that the only reason for the increase in insurance costs is jury verdicts when in truth, enormous profits by insurance companies is a major factor which is hidden from the public by the double books kept by all insurance companies which books would reflect those enormous profits accumulated through the handling of casualty business.

C.) As to Exhibit C

1.) The text implies (without citing statistics and/or specific cases) that enormous awards are received by persons with just a broken nose.

2.) The text unfairly implies, again, that the only reason for the increase in insurance costs is jury verdicts.

D.) As to Exhibit D

1.) The text implies that there are many cases where a defendant "went broke" because a plaintiff recovered a judgment for just a broken leg and on information and belief this is a fabrication or deceptively overstated in an attempt to deceive prospective jurors into worrying about their own pecuniary interest in violation of their oaths. If there is limited insurance in a given case, the great majority of plaintiffs are willing to settle within the limits of the policy covering the defendants; and it is usually when the agents of the covering insurance company fail to settle within the limits, that verdicts over the policy limits occur.

17.) The defendant, CRUM AND FORSTER, wilfully engaged in such deceptive trade practices.

18.) The defendant, AETNA LIFE AND CASUALTY COMPANY, beginning in or about 1977 and continuing to the present, made, published, disseminated and placed before the public in newspapers, magazines and other publications, statements/advertisements in Connecticut and other states, examples of which are attached hereto as Exhibits E, F and G and are incorporated and made a part hereof.

19.) Said statements/advertisements, as set forth are unfair, deceptive and/or misleading and contain (in whole or part) lies and untruths, among which are the following:

A.) As to Exhibit E

1.) The text and footnotes fail to disclose (despite the overall implication of the ad that insurance companies are losing money left and right) that assets of property and casualty companies have continually increased since 1952 with an 18 billion dollar increase in the year 1975 to 1976 up to 112 billion dollars and that policyholder surplus has continually increased since 1952 with an almost 6 billion dollar increase in the year 1975 to 1976 up to 31 billion dollars.

2.) The claim that one million products liability claims are being filed annually is a fabrication.

3.) It suggests that jurors should disregard their oaths, which oaths require jurors to decide cases only on the facts and law which appear in court, and by so doing the ads unfairly criticize jurors who as public spirited citizens truly try to follow the law in carrying out their duties.

4.) It suggests that jurors do not seriously or conscientiously discharge their duty.

5.) It suggests that judges do not caution jurors to be fair in discharging the obligations of their solemn oaths.

6.) It suggests that checks and balances do not exist in the judicial system to prevent excessive awards which rarely occur.

7.) It fails to disclose all the key facts of the boulder case including the fact that the jury considered and discounted the case for the drivers negligence.

8.) It fails to disclose the facts of the injuries to the driver of a "truck without brake lights" and fails to disclose that by the time the ad was conceived, the insurance company had settled the case for less than the original amount which demonstrates that the checks and balances system works.

9.) The footnotes are untruthful.

B.) As to Exhibit F

1.) In addition to many of the same defects pointed out in Paragraph 19A (1-9), the ad suggests that the recovery for the man who lost his arm was based solely on lost wages, when, in fact, the recovery included both loss of earning capacity and compensation for the extensive pain and suffering which the victim of the accident underwent.

2.) It suggests that juries base their awards on sympathy, when, in fact, judges are scrupulously careful to mention to juries that sympathy is not a factor in a jury award and there is no data to support the claim that juries base their awards on sympathy.

C.) As to Exhibit G

1.) It infers that persons with broken legs win "big" lawsuits and are part of the group who have won allegedly 205 million dollars plus verdicts.

2.) It fails to disclose that those plaintiffs who do receive over one million dollars from a jury are usually

those who have suffered the following injuries at the hands of a defendant:

a.) quadraplegia/paraplegia;
b.) irreversible brain damage;
c.) serious multiple burns;
d.) wrongful death.

3.) The footnotes are untruthful and without authority.

4.) One footnote implies that the mere filing of a lawsuit claiming vast amounts is going to send up premiums.

5.) The shoplifting case referred to fails to disclose that part of the award was in punitive damages to punish the defendant for falsely arresting the plaintiff.

20.) The defendant, AETNA LIFE AND CASUALTY COMPANY, wilfully engaged in such deceptive trade practices.

21.) The defendant, D'ARCY, MCMANUS AND MASIUS, beginning in or about 1977 and continuing to the present, caused to be made, published, disseminated, circulated or placed before the public in newspapers, magazines and other publications, statements/advertisements in Connecticut and other states, examples of which are attached hereto as Exhibits E, F and G and are incorporated and made a part hereof.

22.) Paragraph 19 above is adopted and incorporated herein as Paragraph 22.

23.) The defendant, D'ARCY, MCMANUS AND MASIUS wilfully engaged in such deceptive trade practices.

24.) The defendant, TRAVELERS INSURANCE COMPANY, beginning in or about 1976 and continuing to the present, made, published, disseminated, circulated or placed before the public in newspapers, magazines and other publications, statements/

advertisements in Connecticut and other states, examples of which are attached hereto as Exhibits H, I and J and are incorporated and made a part hereof.

25.) Said statements/advertisements as set forth are unfair, deceptive and/or misleading and contain (in whole or part) lies and untruths among which are the following:

A.) As to Exhibit H

1.) There is no evidence to support the inference that liability coverage rates have moved beyond the reach of many people.

2.) There is an inference that manufacturers have held back from making product improvements because of alleged increases in insurance rates which is either untrue or deceptively overstated.

B.) As to Exhibit I

1.) The inference that costs of goods have escalated solely because of the need for additional liability coverage is a deceptive simplification.

2.) There is no or little evidence to support the inference that manufacturers are deliberately not improving products because of fear of liability; in fact, the opposite is true.

3.) No case is cited for the reference that a label on a "new improved" product was used to show an older products deficiency and thus, deceptive inferences are allowed to be drawn without the facts being disclosed.

C. As to Exhibit J

1.) It suggests that no-fault covers property damage.

2.) There are no statistics to support the untrue allegation that most people agree that the no-fault limits should be raised.

3.) It fails to disclose statistics which show that no-fault would reduce insurance costs because it isn't true.

26.) The defendant, TRAVELERS INSURANCE COMPANY, wilfully engaged in such deceptive trade practices.

27.) The defendant, ST. PAUL COMPANIES, INC., beginning in or about 1976 and continuing to the present, made, published, disseminated, circulated or placed before the public in newspapers, magazines and other publications, statements/advertisements in Connecticut and other states, examples of which are attached hereto as Exhibits K, L and M and are incorporated and made a part hereof.

28.) Said statements/advertisements as set forth are unfair, deceptive and/or misleading and contain (in whole or part) lies and untruths, among which are the following:

A.) As to Exhibit K

1.) Deceptively implies that manufacturers are held liable even when products are misused which is untrue.

2.) Cites no source to support its conclusion regarding average settlements, which conclusion is untrue, misleading or both.

B.) As to Exhibit L

1.) Fails to account for huge insurance company profits and surplus as a factor in increasing rates.

2.) Untruthfully implies that there are excessive jury awards when none can be cited; and fails to account for the checks and balances within the system to insure that no excessive verdicts are upheld.

C.) As to Exhibit M

1.) Cunningly tries to imply that jurors are rewarding injured litigants.

2.) Implies that jurors are not capable of abiding by their oaths to award fair, reasonable and just damages and rule out sympathy.

3.) Tries to deceive all insurance policyholders, who may be jurors, into concerning themselves, not with the issues of a case, but what effect it will have on their pocketbook.

4.) Implies that injured persons, in every case can collect "rewards" without showing the injury was caused by the defendant and without showing pain and suffering or the extent of injury and economical loss.

29.) The defendant, ST. PAUL COMPANIES, INC., wilfully engaged in such deceptive trade practices.

30.) As a result of the defendant CRUM AND FORSTER's actions as set forth above, it has violated Section 42-110b (a) of the Connecticut General Statutes.

31.) As a result of such violations, the plaintiffs LINDA YOUNG, KAREN CAWLEY, TERRY DUGAY and KEVIN NAYLOR, and the class they represent, are likely to be damaged by being deprived of their time honored constitutional right to a fair and unbiased jury in the case they currently have pending.

32.) As a result of the defendant AETNA LIFE AND CASUALTY's actions as set forth above, it has violated Section 42-110b (a) of the Connecticut General Statutes.

33.) Paragraph 31 of this count is incorporated herein as Paragraph 33 of the complaint.

34.) As a result of the defendant D'ARCY, MCMANUS AND MASIUS's actions as set forth above, it has violated Section 42-110b (a) of the Connecticut General Statutes.

35.) Paragraph 31 of this count is incorporated herein as Paragraph 35 of the complaint.

36.) As a result of the defendant TRAVELERS INSURANCE COMPANY's actions as set forth above, it has violated Section 42-110b (a) of the Connecticut General Statutes.

37.) Paragraph 31 of this count is incorporated herein as Paragraph 37 of the complaint.

38.) As a result of the defendant ST. PAUL COMPANIES, INC. actions as set forth above, it has violated Section 42-110b (a) of the Connecticut General Statutes.

39.) Paragraph 31 of this count is incorporated herein as Paragraph 39 of the complaint.

WHEREFORE, the plaintiffs request

1.) That the court declare the plaintiffs to represent a class.

2.) A temporary and permanent injunction from unfair, deceptive, untrue and/or misleading advertising.

3.) That the defendants be ordered to begin an advertising campaign calculated to rectify the deliberately mistaken impressions the dishonest ads have created.

4.) Punitive damages.

5.) Costs and reasonable attorneys fees pursuant to Section 42-115e (b) of the Connecticut General Statutes.

SECOND COUNT

1.-30.) Paragraphs 1.-30. of the First Count are incorporated herein as Paragraphs 1.-30. of the Second Count.

31.) As a result of such violations, the plaintiffs and the class they represent have suffered an ascertainable loss of property in that plaintiff's constitutional right to a fair and impartial jury is a vested right guaranteed to them by the constitution of the State of Connecticut and interference with that right is a deprivation of property for which plaintiffs are entitled to recover.

32.) Paragraph 32 of the First Count is incorporated herein as Paragraph 32 of the Second Count.

33.) Paragraph 31 of the Second Count is incorporated herein as Paragraph 33 of the complaint.

34.) Paragraph 34 of the First Count is incorporated herein as Paragraph 34 of the Second Count.

35.) Paragraph 31 of the Second Count is incorporated herein as Paragraph 35 of the complaint.

36.) Paragraph 36 of the First Count is incorporated herein as Paragraph 36 of the Second Count.

37.) Paragraph 31 of the Second Count is incorporated herein as Paragraph 37 of the complaint.

38.) Paragraph 38 of the First Count is incorporated herein as Paragraph 38 of the Second Count.

39.) Paragraph 31 of the Second Count is incorporated herein as Paragraph 39 of the complaint.

WHEREFORE, the plaintiffs request

1.) That the court declare the plaintiffs to represent a class.

2.) A temporary and permanent injunction from unfair, deceptive, untrue and/or misleading advertising.

3.) Actual damages.

4.) Punitive damages.

5.) Costs and reasonable attorneys fees.

THIRD COUNT

1.) Count Three of this complaint arises under common law principles of equity.

2.-30.) Paragraphs 1.-29. of the First Count are hereby incorporated and made Paragraphs 2.-30. of this Third Count.

31.) Defendants were, are and will be real parties in interest in civil litigation before judges and juries in the State of Connecticut.

32.) Such judges and juries are the very people whom defendants seek to influence through their deceptive advertising.

33.) Individual plaintiffs and the class which they represent are likely to suffer and have already suffered irreparable injury as a result of defendants' practices in that the jury panel with which they will be confronted has likely been influenced by the deceptive and misleading practices of defendants.

34.) Plaintiffs have no adequate remedy at law.

WHEREFORE, the plaintiffs pray:

1.) That this court entertain this suit as a class action.

2.) That defendants be temporarily and permanently enjoined from continuing their false and deceptive advertising.

3.) That defendants be ordered to begin an advertising campaign calculated to rectify the mistaken impressions their advertising has created.

4.) The plaintiffs be awarded punitive damages.

5.) Reasonable attorneys fees and costs.

FOURTH COUNT

1.) Count Four of this complaint arises under 42 U.S.C. § 1985(3) which provides that two or more persons who conspire to deprive another of equal rights, privileges or immunities under the law shall be liable in damages to anyone deprived of having or exercising any right or privilege of a citizen of the United States.

2.) Paragraphs 1.-29. of the First Count are hereby incorporated and made Paragraphs 2.-30. of this Fourth Count, as if more fully set forth herein.

31.) At all times relevant to this complaint, the defendants, in conjunction with the following groups,

1.) The Insurance Information Institute (hereinafter referred to as "III");

2.) The American Insurance Association (hereinafter referred to as "AIA");

3.) The American Mutual Insurance Alliance (hereinafter referred to as "AMIA");

4.) The National Association of Independent Insurers (hereinafter referred to as "NAII");

5.) The Insurance Services Office (hereinafter referred to as "ISO"), and

6.) The Property-Casualty Insurance Council (hereinafter referred to as "PCIC"),

exchanged information and coordinated advertising programs which programs were designed to deprive the plaintiffs, either directly or indirectly, of the following rights, privileges and immunities guaranteed to them under the Constitution and laws of the United States of America and the State of Connecticut:

A.) The right to an impartial and unprejudiced jury.

B.) The right to due process of law.

C.) The right to equal protection of the law in that defendants' advertising was designed to have jurors favor one class of litigants over another.

32.) The defendants, CRUM AND FORSTER, AETNA LIFE AND CASUALTY COMPANY, TRAVELERS INSURANCE COMPANY, ST. PAUL COMPANIES, INC. and D'ARCY, MCMANUS and MASIUS, and the III, AIA, AMIA, NAII, ISO and PCIC, on information and belief, exchanged information, coordinated efforts in advertising and agreed to pursue a program of advertising in national media to achieve the ends mentioned in Paragraph 31 above.

33.) The defendants all profited from the exchange of information, coordination and agreements mentioned in Paragraph 32 above.

34.) The defendants and the III, AIA, AMIA, NAII, ISO and PCIC published and caused to be published, various advertisements in furtherance of this conspiracy.

WHEREFORE, the plaintiffs claim:

1.) Damages occasioned by the deprivations suffered as a result of the conspiracy against all defendants.

2.) Temporary and permanent injunctive relief against said conspiracy;

3.) Punitive damages.

4.) Reasonable attorneys fees and costs.

5.) Such other and further relief as this court deems necessary and proper.

WHEREFORE, the plaintiffs, LINDA YOUNG, KAREN CAWLEY, TERRY DUGAY and KEVIN NAYLOR, seek monetary damages and this matter is within the jurisdiction of this Court.

RICHARD A. BIEDER
Commissioner of Superior Court

THEODORE I. KOSKOFF
Commissioner of Superior Court

Please enter appearance for:

KOSKOFF, KOSKOFF & BIEDER, P.C.
1241 Main Street
Bridgeport, Connecticut 06604
Computer NO. 32250

A TRUE COPY ATTEST

ALBENIE GAGNON
Hartford County Deputy Sheriff

Appendix F

Opinion of the United States Court of Appeals for the Fifth Circuit in *Rutledge* v. *Liability Insurance Industry*

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Unit A

No. 79-4078

WILLIAM P. RUTLEDGE,

Plaintiff-Appellant,

versus

THE LIABILITY INSURANCE INDUSTRY, et al,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

(JANUARY 29, 1981)

Before:

AINSWORTH, and SAM D. JOHNSON, *Circuit Judges*
and HUNTER*, *District Judge*

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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1 See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F.2d 966.

* District Judge of the Western District of Louisiana, sitting by designation.

Appendix G

Opinion of the United States District Court for the Western District of Michigan in *Chipman* v. *Aetna Casualty and Surety Co.*

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 78-639 CA7

ALEXANDER JOHN CHIPMAN,

Plaintiff,

v.

AETNA CASUALTY and SURETY COMPANY,

Defendant.

OPINION AND ORDER

This action arises out of advertisements published in national magazines in which the defendant Aetna Casualty and Surety Company (Aetna) expressed its view on the judicial tort liability system in this country. These expressions were published at a time when plaintiff Chipman had a personal injury suit pending in the Michigan circuit court against Aetna. Plaintiff's complaint alleges these publications prejudiced plaintiff's right to a fair and impartial trial. The defendant advocates that the publications are an expression of a political opinion which are protected by the First Amendment. The defendant has filed a motion to dismiss, or alternatively, a motion for summary judgment.

With regard to the motion to dismiss, the Court's inquiry is whether the challenged pleading sets forth allegations sufficient to state a claim upon which relief can be granted. In making this

determination, the allegations contained in the pleadings are taken at "face value," *California Motor Transport Company* v. *Trucking Unlimited*, 404 U.S. 508, 515 (1972), and should be construed favorably to the pleader, *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974). "(W)ell pleaded facts are taken as true, and the complaint is construed liberally in favor of the party opposing the motion," *Davis H. Elliott Company* v. *Caribbean Utilities Company*, 513 F.2d 1176, 1182 (6th Cir. 1975). All reasonable inferences which might be drawn from the pleadings must be included. *Fitzke* v. *Shappell*, 486 F.2d 1072, 1076, n. 6 (6th Cir. 1972).

In a similar fact pattern, several other courts have considered the same Constitutional issues as raised by this motion. In *Quinn* v. *Aetna Life and Casualty Co.*, No. 78C-1628 (E.D.N.Y., filed July 2, 1979), *appeal docketed*, No. 79-7495 (2d Cir. Jan. 28, 1980), and *Rutledge* v. *The Liability Insurance Industry*, No. 78-1506 (W.D. La., filed June 8, 1979), and *Borkoski* v. *Yost*, No. 14265 (S. Ct. Mont., filed April 24, 1979), the courts dismissed the cases as a matter of law on the ground that the ads were protected speech under the First Amendment. Applying the foregoing standards for dismissal in the light most favorable to the plaintiff, this Court concludes that the plaintiff's claim is barred by the protection afforded the defendant under the First Amendment.

This Court has been provided with a transcript of the Michigan circuit court jury trial in which Chipman claims to have been prejudiced. Since the present complaint was filed, the circuit court action has been dismissed. During the jury voir dire in that action, the panel was questioned as to whether they had seen the Aetna advertisements. When they indicated they had not, the jury was given the standard jury instructions and oaths. Both counsel affirmed they were satisfied with the jury. Furthermore, the jury returned a verdict in favor of the defendant finding Chipman had no cause of action. As a result, Chipman petitioned for a new trial which request was denied due to no finding of prejudice nor invasion of a right to a fair trial.

This Court notes that the advertisements in question were not directed solely to the jurors in the Chipman case, but were dis-

seminated to the general reading public. The ads neither mention Chipman by name nor any other plaintiff. It is the opinion of this Court that voir dire, challenges, jury instructions, the oath and other traditional safeguards in the trial process have fully protected plaintiff's interest in a fair trial. Specifically, the other federal courts have ruled:

> "Here, the threat to fair trial is more remote than was the threat in *Nebraska Press* since these ads are not directed to any specific case. Voir dire, jury instructions and other safeguards in our trial process can protect potential plaintiffs."

Rutledge v. *The Liability Insurance Industry,* No. 78-1506, slip op. at 6 (W.D. La. June 28, 1979).

> "The [contention] that plaintiffs' remedies at law—which include the right to voir dire, proper jury instructions, and the jurors' oath—are inadequate to overcome what prejudicial effect these advertisements may have, is untenable. *See Nebraska Press,* supra at 563-65; *Oliver* v. *Postel,* 30 N.Y.2d 171, 182, 282 N.E.2d 306, 311 N.Y.S.2d 407, 415 (1972). The courts regularly rely on such means to secure juries untainted by newspaper coverage of much more pointed prejudicial effect."

Quinn v. *Aetna,* No. 78C-1628, slip op. at 12 (E.D.N.Y. July 2, 1979). This Court concurs.

Aetna claims that the position papers were published as an expression of needed reform in the tort law; that is, a form of political advocacy meant to stimulate debate. Aetna further contends that the position papers do not promote the sale of insurance. However, plaintiff's allegations of prejudice and defendant's intent are irrelevant to the question of whether the ads directed to national readers are protected by the First Amendment.

The courts struggled with the characterization of the ads as commercial speech as opposed to political advocacy.

In *Rutledge* the Court stated:

> "The ads make no attempt to sell insurance or to recommend any particular type of insurance coverage; they propose no commercial transaction. Speech is not stripped of First Amendment protection merely because it is made in the form of a paid advertisement; nor does the fact that it reflects the advertiser's commercial and financial interests deny it constitutional protection. *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). These ads communicate information about the insurance industry and disseminate that industry's opinion and position on matters of public concern, particularly reform of the tort law."
>
> "I conclude that the ads in question should not be characterized as 'commercial speech.' *See First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978); *Bigelow*, *supra* and *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964)."

Rutledge v. *The Liability Insurance Industry*, No. 78-1506, slip op. at 4-5 (W.D.La. June 28, 1979).

In *Quinn*, the District Court stated as follows:

> The state court judge in the present case found that the speech in question is "not protected." 409 N.Y.S.2d at 479. The state court judge engaged in a fundamental misconception by calling the advertisements here in question "commercial speech," *see* 409 N.Y.S.2d at 476, and relying on cases such as *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748 (1976), which, in *dicta*, see id. 425 U.S. at 771-73, describe permissible regulation of speech which does "no more than propose a commercial transaction." *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U.S. at 726. The speech involved in the present case is not commercial speech removed from any "exposition of ideas," *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942). The speech involved here is fully protected political expression. The degree of protection af-

> forded the expression is not lessened by the fact that it is contained in a paid advertisement, *Buckley* v. *Valeo*, 424 U.S. 1, 51 (1976); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265-66 (1964), or that the speaker is a corporation rather than a natural person. *First National Bank of Boston* v. *Bellotti*, 435 U.S. 764, 777 (1978). Nor is the protection given to speech directed at issues of public concern lost because of improper intent of the speaker.
>
> The First Amendment protects the speech itself. The contents of speech cannot be suppressed because we find the speaker biased or the conclusions erroneous or misleading. "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *Id.* at 791. It is presumed that in evaluating such speech "the source and credibility of the advocate" will be considered. *Id.* at 792.

Quinn v. *Aetna*, No. 78C-1628, slip op. at 14-15 (E.D.N.Y. July 2, 1979). The Second Circuit agreed and stated:

> "We affirm the resolution of the First Amendment claim substantially for the reasons set forth in Judge Sifton's thorough and considered opinion, *supra*, ____ F. Supp. ____. The relief sought by plaintiffs is clearly barred by the First Amendment and by recent decisions construing it, and plaintiffs; reliance on the 'commercial speech' doctrine is misplaced."

Quinn v. *Aetna*, No. 79-7495, slip op. at 1080, (2d Cir. Jan. 28, 1980). This Court concurs with the reasoned analysis of these courts.

The safeguards of the rights of free speech and press to the end that individuals may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Under the First Amendment, there is no such thing as a false idea; however pernicious an opinion may seem, its correction de-

pends not on the conscience of judges and juries, but on the competition of other ideas. *Gertz* v. *Robert Welch, Inc.* 418 U.S. 323 (1973). The First Amendment rests on the assumption that the widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1963); *Associated Press* v. *United States,* 326 U.S. 1 (1945).

In light of these decisions, this Court concurs that Aetna's comments on the problems with the tort system in the country are fully protected speech. Therefore, the defendant's motion to dismiss is hereby granted.

IT IS SO ORDERED.

Dated: May 22, 1980

BENJAMIN F. GIBSON
United States District Judge

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

GERALD H. LIEFER, Clerk,
By Caroll Jeffers
Deputy Clerk

Date May 22, 1980

Appendix H

Connecticut Unfair Trade Practices Act

§ 42—110a. Definitions

As used in this chapter:

(1) "Commissioner" means the commissioner of consumer protection;

(2) "Documentary material" means the original or a copy of a book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate;

(3) "Person" means a natural person, corporation, trust, partnership, incorporated or unincorporated association, and any other legal entity; and

(4) "Trade" and "commerce" means the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state.

§ 42—110b. Unfair trade practices prohibited. Legislative intent

(a) No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.

(b) It is the intent of the legislature that in construing subsection (a) of this section, the commissioner and the courts of this state shall be guided by interpretations given by the federal trade commission and the federal courts to section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

(c) The commissioner may, in accordance with chapter 54, establish by regulation acts, practices or methods which shall be

deemed to be unfair or deceptive in violation of subsection (a) of this section. Such regulations shall not be inconsistent with the rules, regulations and decisions of the federal trade commission and the federal courts in interpreting the provisions of the Federal Trade Commission Act.

(d) It is the intention of the legislature that this chapter be remedial and be so construed.

§ 42—110c. Exceptions

(a) Nothing in this chapter shall apply to: (1) Transactions or actions otherwise permitted under law as administered by any regulatory board or officer acting under statutory authority of the state or of the United States; or (2) acts done by the publisher, owner, agent or employee of a newspaper, periodical or radio or television station in the publication or dissemination of an advertisement, where the publisher, owner, agent or employee did not have knowledge of the false, misleading, unfair or deceptive character of the advertisement, and did not have direct financial interest in the sale or distribution of the advertised product or service.

(b) The burden of proving exemption, as provided in this section, from the provisions of this chapter shall be upon the person claiming the exemption.

§ 42—110d. Investigation. Hearing. Orders. Enforcement. Disclosure of information

(a) For the purposes of this chapter the commissioner shall have the power to order an investigation and examination to be made. In addition to other powers conferred upon the commissioner by this chapter, the commissioner or his authorized representatives may issue subpoenas to any person involved in any matter under investigation and examination, administer an oath or affirmation to any person, and conduct hearings in aid of any investigation or examination, provided none of the powers conferred by this chapter shall be used for the purpose of compelling any natural person to furnish testimony or evidence

which might tend to incriminate him or subject him to a penalty or forfeiture; and provided further, information obtained pursuant to the powers conferred by this chapter shall not be made public or disclosed by the commissioner or attorney general or their employees beyond the extent necessary for law enforcement purposes in the public interest, except as provided in subsection (f) of this section.

(b) Said commissioner or his authorized representatives shall have the right to

(1) enter any place or establish within the state, at reasonable times, for the purpose of making an investigation;

(2) check the invoices and records pertaining to costs and other transactions of commodities;

(3) take samples of commodities for evidence upon tendering the market price therefor to the person having such commodity in his custody;

(4) subpoena documentary material relating to such investigation; and

(5) have access to, for the purpose of examination, documentary material and the right to copy such documentary material of any person being investigated or proceeded against. The commissioner or his authorized representatives shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary material relating to any matter under investigation.

(c) In addition to other powers conferred upon the commissioner, said commissioner may execute in writing and cause to be served by certified mail an investigative demand upon any person suspected of using, having used or about to use any method, act or practice declared by section 42-110b to be unlawful or upon any person from whom said commissioner wants assurance that section 42-110b has not, is not or will not be violated. Such investigative demand shall contain a description of the method, act or practice under investigation, provide

a reasonable time for compliance, and require such person to furnish under oath or otherwise, as may be specified in said demand, a report in writing setting forth relevant facts or circumstances together with documentary material.

(d) Said commissioner, in conformance with sections 4-177 to 4-185, inclusive, whenever he has reason to believe that any person has been engaged or is engaged in an alleged violation of any provision of this chapter, shall mail to such person, by certified mail, a complaint stating the charges and containing a notice of a hearing, to be held upon a day and at a place therein fixed at least fifteen days after the date of such complaint. The person so notified shall have the right to file a written answer to the complaint and charges therein stated and appear at the time and place so fixed for such hearing, in person or otherwise, with or without counsel, and submit testimony and be fully heard. Any person may make application, and upon good cause shown shall be allowed by the commissioner to intervene and appear in such proceeding by counsel or in person. The testimony in any such proceeding, including the testimony of any intervening person, shall be under oath and shall be reduced to writing by the recording officer of the hearing and filed in the office of the commissioner. The commissioner or his authorized representatives shall have the power to require by subpoena the attendance and testimony of witnesses and the production of any documentary material at such proceeding. If upon such hearing the commissioner is of the opinion that the method of competition or the act or practice in question is prohibited by this chapter, the commissioner shall make a report in writing to the person complained of in which he shall state his findings as to the facts and shall forward by certified mail to such person an order to cease and desist from using such methods of competition or such act or practice. The commissioner may apply for the enforcement of any cease and desist order or consent order issued under this chapter to the superior court for the judicial district of Hartford-New Britain, or to any judge thereof if the same is not in session, for orders temporarily and permanently restraining and enjoining any person from continuing violations of

such cease and desist order or consent order. Such application for a temporary restraining order and temporary and permanent injunction and for such other appropriate decree or process shall be brought and the proceedings thereon conducted by the attorney general.

(e) In addition to any injunction issued pursuant to subsection (d) of this section, the court may make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any practices prohibited by this chapter, including the appointment of a receiver or the revocation of a license or certificate authorizing the person subject to the order or injunction to engage in business in this state, or both.

(f) In accordance with subsection (a) of this section, the commissioner or the attorney general or their employees shall disclose, upon written request, information concerning complaints for which an investigation is not pending at the time said written request is made, as follows: (1) The name and address of a person against whom a complaint or complaints have been filed alleging a violation or violations of the provisions of this chapter; (2) the total number of complaints filed against a specific person for the current calendar year and the previous calendar year; and (3) a numerical breakdown of the disposition of complaints. For purposes of this section, "disposition" shall include the following action or nonaction with respect to complaints: (A) No action taken because of (i) a lack of jurisdiction; (ii) unsubstantiated allegations or (iii) a lack of sufficient information to draw a conclusion, as determined by the commissioner, after investigation; (B) referral to another state agency, or to a federal or local agency, or to law enforcement authorities; (C) an acceptance of an assurance of voluntary compliance in accordance with the provisions of section 42-110j; and (D) formal action taken, including the institution of administrative proceedings pursuant to subsection (d) of section 42-110d, or court proceedings pursuant to section 42-110m, 42-110*o* or 42-110p.

§ 42—110e. Appeals

Any person required by an order of the commissioner to cease and desist from using any method, act or practice declared unlawful by section 42-110b may appeal therefrom in accordance with the provisions of section 4-183. Appeals under this section shall be privileged cases to be heard by the court as soon after the return day as shall be practicable.

§ 42—110f. Powers of receiver. Restitution. Judicial supervision

When a receiver is appointed by the court pursuant to this chapter, he shall have the power to sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, records, documents, papers, choses in action, bills, notes and property of every description, derived by, or aiding in any manner, any practice declared to be illegal and prohibited by this chapter, including property with which such property has been mingled if it cannot be identified in kind because of such commingling, and to sell, convey, and assign the same and hold and dispose of the proceeds thereof under the direction of the court. Any person who has suffered damages as a result of the use or employment of any unlawful practices and submits proof to the satisfaction of the court that he has in fact been damaged, may participate with general creditors in the distribution of the assets to the extent he has sustained out-of-pocket losses. In the case of a partnership or business entity, the receiver shall settle the estate and distribute the assets under the direction of the court. The court shall have jurisdiction of all questions arising in such proceedings and may make such orders and judgments therein as may be required.

§ 42—110g. Action for damages. Class actions. Costs and fees. Equitable relief

(a) Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-

110b, may bring an action in the judicial district in which the plaintiff or defendant resides or has his principal place of business or is doing business, to recover actual damages. The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper.

(b) Persons entitled to bring an action under subsection (a) of this section may, pursuant to section 42-110h, bring a class action on behalf of themselves and other persons similarly situated who are residents of this state or injured in this state to recover damages.

(c) Upon commencement of any action brought under subsection (a) of this section, the plaintiff shall mail a copy of the complaint to the attorney general and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the attorney general.

(d) In any action brought by a person under this section, the court may award, to the plaintiff, in addition to the relief provided in this section, costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery. In a class action in which there is no monetary recovery, but other relief is granted on behalf of a class, the court may award, to the plaintiff, in addition to other relief provided in this section, costs and reasonable attorneys' fees. In any action brought under this section, the court may, in its discretion, order, in addition to damages or in lieu of damages, injunctive or other equitable relief.

(e) Any final order issued by the department of consumer protection and any permanent injunction, final judgment or final order of the court made under section 42-110d, 42-110m, 42-110*o* or 42-110p shall be prima facie evidence in an action brought under this section that the respondent or defendant used or employed a method, act or practice prohibited by section 42-110b, provided this section shall not apply to consent orders or judgments entered before any testimony has been taken.

(f) An action under this section may not be brought more than three years after the occurrence of a violation of this chapter.

§ 42—110h. Class actions

(a) An action may be maintained as a class action under this chapter only if:

(1) The class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) the representative parties will fairly and adequately protect the interests of the class; and

(5) either

(A) the prosecution of separate actions by or against individual members of the class would create a risk of:

(i) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(ii) adjudications with respect to individual members of the class that would as a practical matter dispose of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(B) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(C) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual mem-

bers, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(b) The matters pursuant to the findings under subsection (a)(5)(C) of this section include:

(1) The interest of members of the class in individually controlling the prosecution or defense of separate actions;

(2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(4) the difficulties likely to be encountered in the management of a class action; and

(5) the likelihood that damages to be recovered by individual class members if judgment for the class is entered will be so minimal in relation to the expense of the action as not to warrant maintenance of the action as a class action.

(c) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subsection may be conditional, and it may be amended before decision on the merits. An order issued under this section shall be immediately appealable by either party.

(d) In a class action maintained under subsection (a)(5)(C) of this section, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to each member who can be identified through reasonable effort. The notice shall advise each member that:

(1) The court will include him in the class, if he so requests by a specified date;

(2) the judgment, whether favorable or not, will include all members who request inclusion; and

(3) a member who requests inclusion may, if he desires, enter an appearance through his counsel.

(e) When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or a class may be divided into subclasses and each subclass treated as a class.

(f) In the conduct of a class action the court may make appropriate orders:

(1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members or to the enforcing authority of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and prevent claims or defenses, or otherwise to come into the action;

(3) imposing conditions on the representative parties or on intervenors;

(4) requiring that the pleadings be amended to eliminate allegations as to representation of absent persons, and that the action proceed accordingly; or

(5) dealing with similar procedural matters.

(g) A class action shall not be dismissed or compromised without approval of the court and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs once the court has determined under subsection (c) of this section that the class action is maintainable as such and so long as such court order remains in effect.

(h) The judgment in an action maintained as a class action under subparagraph (A) or (B) of subsection (a)(5) of this section, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under

subsection (a)(5)(C), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subsection (d) was directed, and who have requested inclusion, and whom the court finds to be members of the class.

§ 42—110i. Settlement of class actions.

(a)(1) A defendant in a class action may file a written offer of settlement. If it is not accepted within a reasonable time by a plaintiff class representative, the defendant may file an affidavit reciting the rejection. The court may determine that the offer has enough merit to present to the members of the class. If it so determines, the court shall order a hearing to determine whether the offer should be approved, and it shall give the best notice of hearing that is practicable under the circumstances, including notice to each member who can be identified through reasonable effort. It shall specify in the notice the terms of the offer and a reasonable period within which members of the class who request it are entitled to be excluded from the class. The statutes of limitations for those who are excluded pursuant to this subsection shall be tolled for the period while the class action has been pending, plus an additional period of one year. (2) If a member who has previously lost an opportunity to be excluded from the class is excluded at his request in response to notice of the offer of settlement during the period specified under subdivision (1) of this subsection, he may not thereafter participate in a class action for damages with respect to the same consumer transaction, unless the court later disapproves the offer of settlement or approves a settlement materially different from that proposed in the original offer of settlement. After the expiration of the period, a member of the class is not entitled to be excluded from it. (3) If the court later approves the offer of settlement, including changes, if any, required by the court in the interest of a just settlement of the action, it shall enter judgment, which is binding on all persons who are then members of the class. If the court disapproves the offer or approves a settlement materially different from that proposed in the original offer, notice shall be given to a person who was

excluded from the action at his request in response to notice of the offer under subdivision (1) of this subsection and he is entitled to rejoin the class and, in the case of such an approval, participate in the settlement.

(b) On the commencement of a class action under section 42-110h, the class representative shall mail, by certified mail with return receipt requested or personally serve a copy of the complaint on the Attorney General. Within thirty days following receipt of a copy, the Attorney General may intervene in the class action.

(c) If a class action has been commenced under this chapter, all subsequent class actions seeking relief on behalf of the same or substantially the same class of consumers in connection with the same consumer transactions shall be stayed pending disposition of the initial class action.

§ 42—110j. Voluntary compliance

In the administration of this chapter, the commissioner may accept an assurance of voluntary compliance with respect to any method, act or practice deemed in violation of this chapter from any person alleged to be engaged or to have been engaged in such method, act or practice. Such assurance may include an amount as restitution to aggrieved persons. No such assurance of voluntary compliance shall be considered an admission of violation for any purpose. Matters thus closed may at any time be reopened by the commissioner for further proceedings in the public interest.

§ 42—110k. Commissioner's enforcement powers. Court orders

If any person fails or refuses to file any statement or report, or obey any subpoena or investigative demand issued by the commissioner or his authorized representatives, the commissioner may, after notice, apply to the superior court for the judicial district of Hartford-New Britain, which court, after a hearing thereon, may issue an order: (1) Granting injunctive

relief to restrain the person from engaging in the advertising or sale of any commodity or the conduct of any trade or commerce that is involved in the alleged or suspected violation; (2) vacating, annulling or suspending the corporate charter of a corporation created by or under the laws of Connecticut or revoking or suspending the certificate of authority to do business in this state of a foreign corporation or revoking or suspending any other licenses, permits or certificates issued pursuant to law to such person which are used to further the allegedly unlawful practice; and (3) granting such other relief as may be required, until the person files the statement or report, or obeys the subpoenas or investigative demand. Any disobedience of any final order entered under this section by any court shall be punished as a contempt thereof.

§ 42—110*l*. Assistance by court prosecutors

The various states attorneys and prosecuting attorneys shall lend to the commissioner or attorney general such assistance as either may request in the commencement and prosecution of actions pursuant to this chapter.

§ 42—110m. Restraining orders or injunctions. Relief

(a) Whenever the commissioner has reason to believe that any person has been engaged or is engaged in an alleged violation of any provision of this chapter said commissioner may proceed as provided in section 42-110d and section 42-110e or may request the attorney general to apply in the name of the state of Connecticut to the superior court for any order temporarily or permanently restraining and enjoining the continuance of such act or acts or for an order directing restitution and the appointment of a receiver in appropriate instances, or both. The court may award the relief applied for or so much as it may deem proper including accounting and such other relief as may be granted in equity. In such action the commisioner shall be responsible for all necessary investigative support.

(b) Nothing contained in this chapter shall be construed as a limitation upon the power or authority of the state, the attorney

general or the commissioner to seek administrative, legal or equitable relief as provided by other statutes or at common law.

§ 42—110n. Consent orders

(a) In the administration of this chapter, the commissioner, any time after the issuance of a complaint provided for in subsection (d) of section 42-110d, may accept an agreement by any person charged with violating the provisions of section 42-110b to enter into a written consent order in lieu of an adjudicative hearing. The acceptance of a consent order order shall be within the complete discretion of the commissioner or such presiding officer as had been designated by the commissioner.

(b) The consent order provided for in subsection (a) of this section shall contain:

(1) An admission of all jurisdictional facts;

(2) an express waiver of the right to seek judicial review or otherwise to challenge or contest the validity of the order;

(3) a provision that the complaint may be used in construing the terms of the consent order;

(4) a statement that the consent order shall have the same force and effect as an order entered after a full hearing and shall become final when issued;

(5) a specific assurance of discontinuance of each of the acts alleged in the complaint;

(6) the signature of each of the individual respondents or his counsel; and

(7) the signature of the commissioner or of his authorized representative.

(c) Negotiations leading up to the acceptance of a consent order are not open to the public. The consent order itself is a matter of public record.

(d) A consent order shall have the same force and effect as a cease and desist order issued pursuant to subsection (d) of section 42-110d.

§ 42—110*o*. Civil penalties

(a) Any person who violates the terms of a temporary restraining order or an injunction issued under subsection (d) of section 42-110d shall forfeit and pay to the state a civil penalty of not more than twenty-five thousand dollars per violation. For purposes of this section the court issuing the injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the attorney general acting in the name of the state may petition for recovery of civil penalties.

(b) In any action brought under section 4 of this act, if the court finds that a person is wilfully using or has wilfully used a method, act or practice prohibited by section 42-110b the attorney general, upon petition to the court, may recover, on behalf of the state, a civil penalty of not more than two thousand dollars for each violation. For purposes of this subsection, a wilful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of section 42-110b.

§ 42—110p. Dissolution, suspension or forfeiture of corporate franchise

Upon petition by the attorney general, the superior court for the judicial district of Hartford-New Britain may, in its discretion, order the dissolution or suspension or forfeiture of the franchise of any corporation which violates the terms of any injunction issued under section 42-110m.

§ 42—110q. Service contract agreements. Fee disclosure required

(a) For the purposes of this section (i) service contractor is defined as a person engaged in the business of repairing, overhauling, adjusting, assembling or disassembling consumer goods; (ii) "person" means a natural person, corporation, trust, partnership, incorporated or unincorporated association, and any other legal entity; (iii) "consumer goods" means any article

purchased, leased or rented primarily for personal, family or commercial purpose.

(b) It shall be an unfair or deceptive trade practice, in violation of this chapter, for any service contractor to fail to disclose to a prospective customer, at the time the prospective customer makes initial contact by any means with the service contractor, that a service call made by the service contractor to the home or business of the prospective customer will require the payment by the prospective customer to the service contractor of separate and distinct fees for the following, if such is the case: (i) Service charge, defined as the fee charged by the service contractor to respond to the request for services; (ii) labor charge.

Appendix I

Listing Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States

AETNA LIFE AND CASUALTY COMPANY

NON-WHOLLY OWNED SUBSIDIARIES

Coventry Land Corporation

Aetna Life and Casualty Limited (Australia)

Hartford Center Hotel Partnership

WHOLLY OWNED SUBSIDIARIES*

The Aetna Casualty and Surety Company
- Geosource Inc.
  - Geografrance S.A. (France)
  - Geosource Ltd. (Canada)
    - Geosource Saudi Arabia Co., Ltd.
    - GH Industrial Services (Saudi Arabia)
  - Petroleum Drilling Services (Australia) Pty. Ltd.
- Rahn Properties II
- Ponderosa Homes
- ABP Associates Limited
- Portside Properties Limited
- 1090 Vermont Avenue N.W. Associates Limited Partnership
- Mariner Brookhollow Joint Venture
- AE Investments Inc.
  - Sioux-McCullough Peak, Ltd.
- Allis-Chalmers Leasing Partnership—1
- Camballin Farms (Australia)
- Taas Associates
- Square 254 Limited Partnership
- 130 John Street Associates

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* This list includes those subsidiaries, wholly owned by Aetna Life and Casualty Company, which have non-wholly owned subsidiaries.

Aetna Life Insurance Company
- AOM Limited
- AOM No. 2 Limited
- ARB Properties
- Bayhill Three Associates
- CS Development Corporation
- East Cactus Plaza Associates
- Friday Associates
- 130 John Street Associates
- Koll Center Newport Number 1
- Koll Center Newport Number 2-3
- Koll Center Newport Number 4
- Koll Center Newport Number 6
- Koll Center Newport Number 7
- Koll Center Newport Number 8
- Koll Center Newport Number 9
- Koll Center Newport Number 10
- Koll Center Newport Number 11
- North Park Plaza Associates
- Pantana Associates
- Parkway Central Plaza Ltd.
- Petro-Search Alpha Limited
- St. Vincents Mall
- Village Plaza Associates
- Watergate Associates
- Biltmore Fashion Park Associates
- Broadbent Business Park Assoc. I
- Broadbent Industrial Center Assoc. I
- Chris-Town Village Associates
- Crossroads Shopping Center
- Edina Office Center Joint Venture
- Empire Park Associates
- Golden State Associates
- Hillcrest Associates
- Meridian Associates
- Silverada Mall
- Tatum Associates

Washington Plaza
Westwood Mall Associates
Wit Associates

AE Properties, Inc.
Crossroads Limited
Koll Business Centers—Bay Area
Koll Business Centers—Orange
Koll Business Centers—San Diego
Koll Business Centers—San Diego #2
Koll Business Centers—Seattle
Koll Business Centers—Seattle #2
Northway Square Phase One
Rancho San Diego Village Associates
Valley Plaza Limited

The Excelsior Life Insurance Company (Canada)
Citrex Properties, Inc. (Ontario)
1001 Boulevard De Maisonneuve O. Inc. (Canada)
Landex Properties Limited (B.C.)
Cottonwood Corner Shopping Ctr. Inc. (B.C.)
Marex Properties Limited

Urban Investment and Development Co.
160 Acre Tract Venture
B.K. Urban Venture
City Place Venture
Hodges Urban Venture
Marban
Merritt-Urban Venture
Logan Square Building Corporation
One Logan Square Associates
Merritt-Urban II Venture
Inland Construction, Inc.
Inland-Hussinger Joint Venture
Inland-Wilson Joint Venture
95th and Jeffrey Center
Mezzanine Restaurant Joint Venture

Montbello Commercial Venture
Montbello Community Venture
Oakbrook-Urban Joint Venture
Montbello Industrial Lease Venture
Montbello No. 10 Joint Venture
The Robbins Company
Hanover Properties
Streamwood Industrial Properties
Old Orchard-Urban Joint Venture
Urban Miller-Davis Carlsbad Venture
Urban Miller-Davis Quincy Venture
Quincy Investment Company
Denver Tech Center Associates
DTC Shopping Center Associates
Ritz-Carlton Water Tower Venture
UIDC of Wisconsin, Inc.
MGIC Plaza East Venture
UIDC of Denver, Inc.
Energy Center I
Energy Center II
Denver Energy Center Hotel Venture
Energy Center III
First of Denver Plaza
UIDC of Washington, Inc.
Urban Four-Seasons Hotel Venture
200 S. Wacker Venture
West Glenn Venture

Aetna Diversified Properties, Inc.
K A Pendleton
Santiago Ranchos

Aetna Life Insurance and Annuity Company
Aetna Income Shares, Inc.
Aetna Variable Fund, Inc.

Telecom Information Systems, Inc.
Local Digital Distribution Company

Aetna Satellite Communications, Inc.
Satellite Business Systems

CRUM AND FORSTER*

SUBSIDIARIES:

*J.H. Blades & Co. (International) Ltd. (Bermuda)***
Blades, Driver & Co., Ltd. (United Kingdom)

*Floyd West & Company****
Commonwealth County Mutual Insurance Company
Commonwealth Lloyd's Insurance Company

ST. PAUL FIRE AND MARINE INSURANCE COMPANY

The St. Paul Fire and Marine Insurance Company is a wholly owned subsidiary of *The St. Paul Companies, Inc.*

Subsidiaries (except wholly owned subsidiaries) of the *St. Paul Fire and Marine Insurance Company:*
Western Life Insurance Company

The following are also wholly owned subsidiaries of *The St. Paul Companies, Inc.* and are affiliated with *St. Paul Fire* and *Marine Insurance Company:*
Ohio Title Corporation
St. Paul Title Company
St. Paul Title Company of Kansas, Inc.
St. Paul Title and Trust of Arizona, Inc.
Memphis Title Company
St. Paul Title Insurance Corporation
St. Paul Land Resources, Inc.
Postal Financial Corporation
Ridesharing, Inc.
The St. Paul Leasing Company
St. Paul Advisers, Inc. (99.80% owned)
John Nuveen & Co. Incorporated

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* Appellant The North River Insurance Company is a wholly owned subsidiary of Crum and Forster.

** Owned 100% by a subsidiary of Crum and Foster.

*** Owned 100% by Crum and Foster.

THE TRAVELERS INSURANCE COMPANY

SUBSIDIARIES:

The Travelers Indemnity Company
The Travelers Corporation
Phoenix Insurance Company
Charter Oak
Fire Insurance Company

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
OCT 15 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-533

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

AETNA LIFE AND CASUALTY COMPANY, CRUM AND FORSTER, THE NORTH RIVER INSURANCE COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, THE TRAVELERS INSURANCE COMPANY,

Appellants,

v.

LINDA YOUNG, KAREN CAWLEY, TERRY DUGAY, KEVIN NAYLOR,

Appellees.

On Appeal from the Superior Court of Connecticut, Fairfield County

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MOTION TO DISMISS

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QUESTION PRESENTED

Does the refusal of a Connecticut state trial court to rule on the merits of a defense raised under the First and Fourteenth Amendments before a sufficient evidentiary background is available constitute a final judgment subject to review by this Court?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
MOTION TO DISMISS	1
STATEMENT OF THE CASE	3
ARGUMENT:	
I. THE RULING BELOW DID NOT ADJUDICATE THE CONSTITUTIONAL VALIDITY OF A STATE STATUTE	11
II. THE RULING BELOW IS NOT A FINAL JUDGMENT WITHIN THE MEANING OF 28 U.S.C. §1257(2)	12
III. THE NEW EXCEPTION TO THE FINALITY RULE PROPOSED BY THE APPELLANTS VIOLATES PRINCIPLES OF FEDERALISM	20
IV. THE APPROACH OF THE STATE COURT CONFORMS WITH THE DECISIONS OF THIS COURT CONCERNING REGULATION OF COMMERCIAL SPEECH	24
CONCLUSION	29
APPENDIX	A-1

TABLE OF AUTHORITIES

Cases	Page
Amodio v. Cunningham, 42 Conn. L.J. No. 7, p.1, ___ A.2d ___(1980)	14
Bates v. State Bar of Arizona, 433 U.S. 350 (1976)	25
Bellotti v. Baird, 428 U.S. 132 (1976)	22
Bigelow v. Virginia, 421 U.S. 809 (1975)	25,26
Blanchard v. Nichols, 135 Conn. 391, 64 A.2d 878 (1949)	14
Chipman v. Aetna Casualty and Surety Co., No. 78-639 CA 7 (W.D. Mich. May 22, 1980)	28
Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976)	22
Connecticut Rural Roads Improvement Association v. Hurley, 124 Conn. 20, 197 A. 90 (1938)	14
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	12,15 16,18

TABLE OF AUTHORITIES

Cases	Page
First National Bank v. Bellotti, 435 U.S. 765 (1978)	26
Friedman v. Rogers, 440 U.S. 1 (1979)	25,26
Lake Carriers Association v. MacMullen, 406 U.S. 498 (1972)	22
Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977)	25,26
McAnerney v. McAnerney, 165 Conn. 277, 334 A.2d 437 (1973)	14
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)	18
Naylor v. Case and McGrath, Inc., 585 F.2d 557 (2d Cir. 1978)	5,7,8 21,22 23,28
New York v. Cathedral Academy, 434 U.S. 125 (1977)	12
New York Times Co. v. Jascalevich, 439 U.S. 1331 (1978) (Marshall, J.) (opinion in chambers)	19

TABLE OF AUTHORITIES

Cases	Page
New York Times Co. v. Sullivan, 376 U.S. 251 (1963)	17,19
North Dakota State Board of Pharmacy v. Snyder Drug Stores, Inc., 414 U.S. 156 (1973)	16
Quinn v. Aetna Life and Casualty Co., 616 F.2d 38 (2d Cir. 1980)	28
Radio Station WOW, Inc. v. Johnson 326 U.S. 120 (1945)	24
Rinaldi v. The Village Voice Inc., 365 N.Y.S. 2d 199 (App. Div. 1975)	19
Rutledge v. Liability Insurance Industry, 487 F. Supp. 5 (W.D. La. 1979), aff'd. mem. ___ F.2d (5th Cir. 1981)	28
State ex rel. Moriarty v. Smith, 72 Conn. 572, 45 A. 355 (1900)	14
Tango v. New Haven, 173 Conn. 203, 377 A.2d 284 (1977)	14

TABLE OF AUTHORITIES

Cases	Page
The Village Voice, Inc. v. Rinaldi, 365 N.Y.S.2d 199, cert. denied, 423 U.S. 883 (1975)	18,19
Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976)	25,26
Constitutional Provisions and Statutes	
U.S. Const. Amend. I	passim
U.S. Const. Amend. XIV, §1	11
28 U.S.C. §1257(2)	2,11 12,13,18
28 U.S.C. §1292(b)	7
Connecticut Unfair Trade Practices Act, §42-110a et seq. Conn. Gen. Stat.	passim
Other Authorities	
Rule 16.1(a) of the Rules of the Supreme Court of The United States	1

No. 81-533

IN THE

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OCTOBER TERM, 1981

AETNA LIFE AND CASUALTY COMPANY, CRUM AND FORSTER, THE NORTH RIVER INSURANCE COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, THE TRAVELERS INSURANCE COMPANY,

Appellants,

v.

LINDA YOUNG, KAREN CAWLEY, TERRY DUGAY, KEVIN NAYLOR,

Appellees.

On Appeal from the Superior Court of Connecticut, Fairfield County

MOTION TO DISMISS

Pursuant to Rule 16.1(a) of the Rules of the Supreme Court of the United States, the appellees respectfully move that this

appeal be dismissed. The denial of by the Superior Court of the State of Connecticut of motions to strike the allegations of the complaint is not a final judgment, and the appeal is therefore not within the jurisdiction of this Court pursuant to 28 U.S.C. §1257(2). The state court's deferral of consideration of the appellants' federal constitutional defenses until development of an evidentiary record does not constitute a final determination of these claims and does not impermissibly restrain the appellants' speech.

STATEMENT OF THE CASE

The appellant insurance companies are, by virtue of contracts with their insureds, the real parties in interest in the defense of most personal injury litigation before juries in Connecticut state courts. In 1977 and 1978, the appellants pursued intensive advertising campaigns which sought to affect the outcome of such cases by warning prospective jurors to decide personal injury cases on the basis of the personal cost to them of increased insurance premiums. These advertisements also sought to attract insurance business by enhancing the insurers' image as crusaders against various alleged trends. The most hysterical of these advertisements relied on fictitious "statistics" to depict a crisis in products liability law. All of the advertisements used

false, misleading and deceptive statements in aid of the appellants' commercial purposes of reducing adverse verdicts and increasing their sponsors' corporate image and market share.

The appellees, as persons with pending personal injury suits which had been claimed for jury trial, brought suit in state court against the insurance companies, alleging violations of the Connecticut Unfair Trade Practices Act, §§42-110a et seq. Conn. Gen. Stat. (CUTPA). That statute prohibits, inter alia, false and misleading advertising or conduct by companies doing business in Connecticut. The appellees further invoked the equitable powers of the Connecticut state courts to safeguard the fairness of pending legal proceedings by prohibiting attempts by litigants to deprive them of fair jury trials. They

seek both equitable relief and money damages.

The appellants removed the action to federal court because of inclusion of an additional, federal cause of action which was later voluntarily dismissed. The action against the insurers was consolidated with Naylor v. Case and McGrath, Inc., a similar action against the advertising agency retained by appellant Aetna Life and Casualty Company (Aetna). In the federal district court the appellants moved to dismiss the remaining three counts of this action and the two CUTPA counts of Naylor, arguing that the plaintiffs had not stated a cause of action under CUTPA and that their advertisements were entitled to absolute protection under the First Amendment, regardless of their truth or falsity.

Appellant Aetna admitted in the course of the district court proceedings that at least one statement relied on in the advertisement reproduced at App. D-3 of appellants' Jurisdictional Statement was in fact false.* In a verbal ruling in open court on May 9, 1978, the district court denied without prejudice the claims of First Amendment protection pending development of an evidentiary background. (All relevant portions of the transcript of that ruling are set forth in the Appendix hereto at App. A-1). The district court also granted motions to dismiss the two CUTPA claims on the ground

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* Hereafter, "A. App." is used to designate pages in the appendices to Appellants' Jurisdictional Statement. This admission, which appears at page 26 of Aetna's Memorandum in Support of Motion to Dismiss and in Opposition to Preliminary Injunction, dated March 22, 1978, is reproduced at page A-1 of the Appendix hereto.

that the plaintiffs lacked standing to invoke CUTPA.

After that ruling, the common law count remained in this action, and the appellants sought no appeal under 28 U.S.C. 1292(b) at that time from the denial of their First Amendment defenses. The court's ruling disposed of all the claims in Naylor v. Case and McGrath; and the plaintiffs appealed to the Court of Appeals for the Second Circuit on the ground that the district court should have abstained rather than decide novel issues of an unconstrued state regulatory statute. During the pendency of the Naylor appeal, the district court delayed the evidentiary hearing by which it had intended to develop enough evidence to resolve the First Amendment issues in this case.

The appellee advertising agency in Naylor briefed and argued Aetna's claim of First Amendment protection to the Second Circuit. That court ruled only that the district court should have abstained. Naylor v. Case and McGrath, Inc., 585 F.2d 557 (2d Cir.1978). The Second Circuit ordered the case remanded to state court for further proceedings. No appeal or petition for certiorari was filed in Naylor after that ruling.

Both Naylor and this case were then remanded to the Connecticut Superior Court. The insurers moved to strike the complaint, arguing that the provisions of the CUTPA did not apply to such advertisements and that, if the statute did apply, the advertisements were entitled to full First Amendment protection whether or not they were instances of false, misleading or deceptive commercial activity.

The Superior Court denied the motions to strike, noting that this Court continues to recognize the ability of the states to regulate false and misleading commercial speech. (A. App. A13-15). The Superior Court has declined to decide whether the advertisements are subject to regulation until an adequate evidentiary basis is available to determine whether they are commercial in nature and whether the statements included in them are false and misleading. The court rejected the insurers' contention that these factual determinations must be made on the face of the advertisements. The Superior Court declared itself "unable to agree that the issues are patent enough for resolution on a motion to strike" without further evidence and declined to follow what it perceived to be the federal courts'

practice of deciding such issues merely by inspection of the advertisements. (A. App. A14-15). The court observed that "Connecticut's Supreme Court has repeatedly noted that to determine the constitutionality of a statute the factual circumstances of application may bear heavily on the determination." (A. App. A-16).

The Connecticut Supreme Court denied the insurers' motion for permission to file an interlocutory appeal. (A. App. B-2).

Throughout the history of this litigation, no court has entered any injunction against the advertisements complained of, and the appellants merely face potential civil liability at the conclusion of the state court proceedings.

ARGUMENT

I. THE RULING BELOW DID NOT ADJUDICATE THE CONSTITUTIONAL VALIDITY OF A STATE STATUTE

The gist of the appellants' defense under the First and Fourteenth Amendments, stated in their motions to strike the complaint, was that the appellees may not maintain a suit under the CUTPA seeking relief from their advertising practices. In effect, they claimed immunity from suit for their advertisements. They did not draw in question the validity of the CUTPA or of any other state statute on the ground of its being repugnant to the Constitution of the United States, nor did the Superior Court uphold the constitutionality of a state statute. Since appellate jurisdiction under 28 U.S.C. §1257(2), the only source identified by the appellants, is limited to such a situation, the appellants have asked this Court to review a ruling not within the

subject matter of its appellate jurisdiction.

II. THE RULING BELOW IS NOT A FINAL JUDGMENT WITHIN THE MEANING OF 28 U.S.C. § 1257(2)

Even if this appeal is viewed as meeting the subject matter requirements of 28 U.S.C. §1257(2), the decision appealed from was not a final judgment. A lower court decision is final within the meaning of 28 U.S.C. §1257(2) if it finally determines a federal constitutional issue to the extent that any further proceedings in the lower court after the ruling cannot remove or otherwise affect the threshold federal issue. New York v. Cathedral Academy, 434 U.S. 125, 128 n.4 (1977), Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 478-480 (1975).

The contested ruling of the Connecticut Superior Court has no such effect. That ruling is specifically limited to a determination that there is an insufficient evidentiary background to permit the Superior Court to decide at this stage of the pleadings that, as a matter of law, the interests of the appellants outweigh the interests of the State of Connecticut in fair jury trials and in truthful trade practices, as expressed in the CUTPA:

> In the instant case, the Court is unable to balance the competing interests based on what has been submitted to it. Sufficient evidence must still be presented toward determination of the issues. (A. App. A-14).

The Superior Court has made no determination, final or otherwise, as to the appellants' asserted First Amendment defenses. Rather, the Superior Court

declared itself unable, as a matter of state practice compelled by the limited function of a Motion to Strike, to characterize the contested advertisements either as commercial or non-commercial merely by inspecting the documents on their face. (A. App. A 1-2, 14-15).*

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*A motion to strike (formerly a demurrer) Amodio v. Cunningham, 42 Conn. L.J. No. 7, pp. 1, 2, _____ A.2d _____ (1980) admits the truth of the allegations of a complaint. Tango v. New Haven, 173 Conn. 203, 205, 377 A.2d 284, 285 (1977); Connecticut Rural Roads Improvement Association v. Hurley, 124 Conn. 20, 25, 197 A. 90 (1938). The complaint alleged that the advertisements were false, misleading and deceptive (A. App. E-14) and that the appellants willfully engaged in deceptive trade practices (A. App. E-8, 10, 11, 12, 13). Connecticut courts are precluded under the state rules of practice from bringing additional facts into the record in deciding such a motion. McAnerney v. McAnerney, 165 Conn. 277, 334 A.2d 437 (1973); State ex rel. Moriarty v. Smith, 72 Conn. 572, 574, 45 A. 355 (1900); Blanchard v. Nichols, 135 Conn. 391, 392, 64 A.2d 878 (1949).

The ruling by no means determines the appellants' First Amendment defenses; it merely defers consideration of them until the court has an adequate factual record on which to rule.

The appellants characterize this delay in consideration as a "final determination that the United States Constitution does not require appellees' complaint to be dismissed on its face." (Jurisdictional Statement, at 23). By this logic, any rule of state court practice which prolonged the course of litigation in which a potential First Amendment defense existed would be a final determination leading to immediate appeal under 28 U.S.C. §1257(2).

The claimed resemblance to Cox Broadcasting Corp. v. Cohn, 420 U.S. 469(1975) is illusory. In that case, the

federal constitutional issue had been finally adjudicated by the highest court of the State of Georgia, which sustained a statutory limitation on speech as a "legitimate limitation on the right of freedom of expression contained in the First Amendment." Cox Broadcasting Corp. v. Cohn, supra, at 475. While that court's ruling included a remand, the remand did not authorize any further consideration or review of the First Amendment claim. Cox Broadcasting Corp. v. Cohn, supra, at 485.

Similarly, the state court ruling at issue in North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 162 (1973), which declared a state statute unconstitutional, was held to be final because the petitioners were unable to preserve their constitutional

claims for review after proceedings on remand. By contrast, no court has foreclosed the appellants herein from continuing to assert their defenses based on the First Amendment.

The situation resembles that presented with regularity in libel and slander cases in which factual disputes as to the falsity of a statement preclude resolution of First Amendment defenses by summary judgment. In such cases, as in this one, the proceedings continue until the evidentiary record is sufficiently developed to allow review of the elements of the First Amendment defense. New York Times Co. v. Sullivan, 376 U.S. 251, 267 (1963). The claim that potential exposure to civil liability meanwhile restrains or chills the speech of the promulgator of the contested statements

does not give rise to a right to an immediate appeal to this Court in such cases. For example, in The Village Voice, Inc. v. Rinaldi, 423 U.S. 883 (1975), a petition for certiorari was denied for want of a final judgment where a newspaper sought immediate review of the denial of its motion for summary judgment in a libel case.*

That case involved an advertisement touting the newspaper's own coverage of a judge's performance. Rinaldi v. The Village Voice, Inc., 365 N.Y.S. 2d 199,

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*The only dissent from this Court's determination that the judgment was not final was that of Justice Douglas, who was of the view that no restriction whatsoever may be imposed on speech. Evidently only he thought that Cox Broadcasting Corp. v. Cohn, supra, and Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), rendered such a ruling final within the meaning of 28 U.S.C. §1257(2). The Village Voice, Inc. v. Rinaldi, supra, 423 U.S. 883.

200 (App. Div., 1975). Denial of the newspaper's motion for summary judgment, in which it invoked New York Times Co. v. Sullivan, supra, was upheld on the ground that even if the advertisements were privileged under the First Amendment, a factual dispute existed as to whether the advertisement was truthful or false and malicious. Rinaldi v. The Village Voice, Inc., supra, 365 N.Y.S. 2d at 201.

The mere continuation of a suit contesting the appellants' advertisements does not constitute either irreparable injury or prior restraint, as the appellants claim. (Jurisdictional Statement, at 24). There is no injunction in force against the appellants. The continuation of this suit involves no coercive sanctions akin to the substantial coercive penalties in New York Times Co. v.

Jascalevich, 439 U.S. 1331, 1333-34 (1978), (Marshall, J.) (opinion in chambers).* Here, the appellants face only potential civil liability if their First Amendment claim is ultimately rejected and if the plaintiffs prevail in proving violations of state law.

III. THE NEW EXCEPTION TO THE FINALITY RULE PROPOSED BY THE APPELLANTS VIOLATES PRINCIPLES OF FEDERALISM

The appellants in effect ask this Court to create a new exception to the rule that appeal may be had only from final rulings of state courts on federal constitutional issues. They urge that despite the plain intention of the Connecticut court to

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*Even under the circumstances of ongoing civil contempt penalties for assertion of First Amendment rights, Justice Marshall was of the opinion that a grant of certiorari would not be made "with the case in its present posture" that is, while the case was still under consideration by the state courts of New Jersey. Id. at 1337.

consider their First Amendment challenge to the applicability of the CUTPA to their advertising campaigns, this Court should interject its determination of the constitutionality of the state law based on the face of the advertisements. The appellants argue that such an intrusion is justified where a state court's insistence on following its own procedures postpones a final determination of First Amendment defenses.

The Court of Appeals for the Second Circuit declined this invitation when it was made in Naylor v. Case and McGrath, Inc., 585 F.2d 557, 564 (2d Cir. 1978). That court, noting that the CUTPA is both a relatively new and recently amended state regulatory statute, found abstention by the federal courts to be appropriate for two reasons. First, it relied on

the principle that state courts should have the first opportunity to determine issues arising under unconstrued state statutes susceptible of constructions which might either avoid or materially change the nature of the constitutional issues presented. Naylor v. Case and McGrath, Inc., supra, at 564, citing Bellotti v. Baird, 428 U.S. 132, 146-147 (1976); Lake Carriers Association v. MacMullen, 406 U.S. 498, 510-511 (1972). Second, that court invoked Colorado River Water Conservation District v. United States, 424 U.S. 800, 814-816 (1976), which requires deference to state adjudication of unresolved questions regarding state statutes which seek to regulate in important areas of state concern. Naylor v. Case and McGrath, Inc., supra, at 564-565.

The Second Circuit in no way indicated that Connecticut courts must suspend their own rules of pleading or forego the evidentiary basis which would illuminate construction of a new statute.

The considerations of comity which buttress both abstention doctrines relied on in Naylor v. Case and McGrath, Inc. have likewise governed this Court's approach to the finality requirement:

> This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court. Here we are in the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene in State litigation only after "the highest court of a State in which a decision in the suit could be had" has rendered a "final judgment or decree". Sec. 237 of the Judicial Code, 28, U.S.C. Sec. 344(a). This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945).

The state court's determination that the constitutionality of state statutes should not be assessed without a sufficient factual record is grounded in Connecticut case law, and impatience with state procedure does not entitle the appellants to have this Court substitute its process for those of the state courts, which have made no final determination.

IV. THE APPROACH OF THE STATE COURT CONFORMS WITH THE DECISIONS OF THIS COURT CONCERNING REGULATION OF COMMERCIAL SPEECH

Contrary to the position set forth by the appellants, a distinction between commercial and non-commercial speech is still recognized by this Court. Commercial speech continues to be subject to regulation on a different basis from

other speech; and false, misleading or deceptive commercial speech has repeatedly been held by this Court to lack entitlement to First Amendment protection. Friedman v. Rogers, 440 U.S. 1, 9-10 (1979); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 91-92, 98 (1977); Bates v. State Bar of Arizona, 433 U.S. 350, 372 (1976); Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 770, 771-772, n. 24 (1976); Bigelow v. Virginia, 421 U.S. 809, 826, 828 (1975). Unlike this case, in which false statements are alleged and, in one instance, admitted,* the commercial speech at issue in the cases in which this Court has considered the scope of First Amendment protection has not

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*See Statement of the Case, above, at p. 6.

entailed false or misleading statements.**

The appellants' claim that failure to dismiss the suit on the pleadings impermissibly chills speech ignores the recognition by this Court that "[c]ommercial speech, because of its importance to business profits, and because it is carefully calculated, is also less likely than other forms of speech to be inhibited by proper regulation." Friedman v. Rogers, supra, 440 U.S. at 10.

**Likewise, the advertisements at issue in First National Bank v. Bellotti, 435 U.S. 765 (1978) were not alleged to contain false or misleading statements. Therefore, the Court's ruling was in the context of truthful speech only, and the case in no way diminished the rulings in Bigelow v. Virginia, supra; Virginia Pharmacy Board v. Virginia Consumer Council, supra; and Linmark Associates, Inc. v. Willingboro, supra, that false or misleading commercial speech merits no First Amendment protection and is subject to trade regulation.

Though this Court has, in dicta in the cases cited above, provided some illustrations of what is and is not, in its judgment, commercial speech, this Court has never had occasion to decide a case on the basis of the characterization of speech as commercial or not commercial. In each case to date, the truthful nature of the speech at issue ended the inquiry. At the point that this Court faces the need to decide a case on the basis of whether or not contested speech is commercial, it is to be expected that it will wish to do so with the benefit of a complete evidentiary record to provide a factual context. The Connecticut Superior Court is plainly entitled to take the same approach. The fact that other courts have professed to be able to make this determination merely on the

face of the advertisements in no way compels the courts of the State of Connecticut to do the same, especially when the validity of a state regulatory statute is at issue. None of the other jurisdictions which has considered appellant Aetna's asserted First Amendment claim has had to weigh against it the state's interest as expressed in a statute granting a private cause of action, as is the case here.* As the Second Circuit indicated in Naylor v. Case and McGrath, Inc., the state courts of Connecticut should be allowed to

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*Rutledge v. Liability Insurance Industry, 487 F. Supp. 5 (W.D. La. 1979), aff'd mem., _____ F.2d _____ (5th Cir. 1981); Chipman v. Aetna Casualty and Surety Co., No. 78-639 CA 7 (W.D. Mich. May 22, 1980) (A. App. G-1). The Court of Appeals for the Second Circuit specifically noted the absence of any such countervailing statutory interest. Quinn v. Aetna Life and Casualty Co., 616 F.2d 38, 41 (2d Cir. 1980).

resolve new issues involving state regulations. Moreover, they should be allowed to do so with the thoroughness they deem necessary, on the basis of a fully developed record.

CONCLUSION

For the reasons stated above, this Court should dismiss the appeal. If the Court treats the appeal as a petition for certiorari, the petition should be denied.

Dated: October 13, 1981
Bridgeport, Connecticut

Respectfully submitted,

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APPENDIX

Excerpt from transcript of oral ruling of United States District Court Judge T.F. Gilroy Daly, in open court on May 9, 1979:

* * * *

THE COURT: Anything further, Gentlemen and Mrs. Hodgson?

With due regard and appropriate respect to Judge Missal's decision, and with an awareness that it was del ered in a completely as I view it different factual pattern, I do not find it persuasive. And I do not believe that the plaintiffs in either one of the cases are within the classes that are meant by the legislature to be protected by C.U.T.P.A.

And, accordingly, I adhere to my earlier ruling that the plaintiffs lack standing under C.U.T.P.A. and the counts that went out before in both complaints I guess one complaint goes out and the first

two complaints in the other count remain out.

I should indicate that a decision has been reached with regard to the First Amendment. The motions to dismiss are at this time denied without prejudice. We have been trying to keep current with the Supreme Court in its ongoing pronouncements, and I'm confident as I ever will be, I suspect, that I understand what the Court is saying and believe that it is necessary to go forward with an evidentiary hearing and I would expect within a few days and I will take the liberty and the right to define it for you. A memorandum on that issue will be--

MR. COTTER: I didn't quite understand, are you deciding there will be evidence?

THE COURT: The motions to dismiss based on the First Amendment are at this time without prejudice denied.

MR. COTTER: So you will want to take evidence?

THE COURT: Yes, sir.

MR. COTTER: Before this summer?

THE COURT: Perhaps we can go into chambers and talk about that. I'm going to be amenable to whatever is necessary.

We will take a recess at this time.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

LINDA YOUNG, ET AL : CIVIL ACTION NO.

VS. : B 78-62

CRUM & FORSTER,
ET AL : MARCH 22, 1978

MEMORANDUM IN SUPPORT OF MOTION
TO DISMISS AND IN OPPOSITION
TO PRELIMINARY INJUNCTION

* * * *

The only erroneous statement in Exhibits E, F and G is the 1970 statistic that product liability cases have reached a level of nearly a million a year at the present time, which figure was taken from a legal periodical. The inaccuracy was discovered by Aetna and eliminated from subsequent editions. It is plain that this statement, promptly corrected, is not material or significant in this action. For the rest, the charges leveled

at the Aetna material consist entirely of innuendo and a broadside attack on the insurance industry at large. On these complaints, plaintiffs have no likelihood of success.

* * * *

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Appellant's Reply Brief

No. 81-533

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AETNA LIFE AND CASUALTY COMPANY, CRUM AND FORSTER, THE NORTH RIVER INSURANCE COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, THE TRAVELERS INSURANCE COMPANY,

Appellants,

v.

LINDA YOUNG, et al.,

Appellees.

On Appeal from the Superior Court of Connecticut, Fairfield County

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS THE APPEAL

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TABLE OF CONTENTS

PAGE

PRELIMINARY STATEMENT 1

ARGUMENT:

I. THE DECISION BELOW IS DANGEROUSLY WRONG AND SHOULD BE REJECTED FORTHWITH BY THIS COURT 2

II. THE DECISION BELOW IS PROPERLY BEFORE THIS COURT PURSUANT TO 28 U.S.C. § 1257(2). 4

A. The Decision Below Upheld The Validity Of CUTPA As Applied 4

B. The Decision Below Is Final Within The Meaning Of 28 U.S.C. § 1257 7

CONCLUSION 10

TABLE OF AUTHORITIES

Cases: PAGE

Bates v. *State Bar of Arizona*, 433 U.S. 350 (1977) 4

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) . 6, 8

Eastern Railroad Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) 2

Japan Line, Ltd. v. *County of Los Angeles*, 441 U.S. 434 (1979)..... 5

Lawrence v. *State Tax Commission*, 286 U.S. 276 (1932) 6, 7

Ohralik v. *Ohio State Bar Association*, 436 U.S. 447 (1978) 3

Super Tire Engineering Co. v. *McCorkle*, 550 F.2d 903 (3rd Cir.), *cert. denied*, 434 U.S. 827 (1977)..... 7

Village Voice, Inc. v. *Rinaldi*, 423 U.S. 883 (1975)..... 8

Statutes:

28 U.S.C. § 1257.....1, 7, 8, 9, 10

28 U.S.C. § 1257(2) 1, 7

28 U.S.C. § 1257(3) 7

Connecticut Unfair Trade Practices Act ("CUTPA"), C.G.S. §§ 42-110a *et seq.* 1, 2, 4, 5, 6

Other Authority:

R. Stern and E. Gressman, *Supreme Court Practice*, (5th ed. 1978)..... 5, 6

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS THE APPEAL

Preliminary Statement

Appellees do not dispute that the decision below squarely conflicts with the decisions of five different federal courts and creates a conflict within the Second Circuit between the Federal and Connecticut courts on an important First Amendment issue.

Appellees also do not dispute that, if the decision below were not reviewed and reversed by this Court at this time, the consequences would be significant and severe—for appellants, for the public at large, and for First Amendment values.

In short, appellees do not dispute that the classic attributes for review by this Court are present here.

Rather than address those critical points, appellees respond to appellants' Jurisdictional Statement with a cursory discussion of the merits (M.D. 24-29)* and with a motion to dismiss the appeal on the grounds, (a) that the decision below did not adjudicate the constitutional validity of CUTPA, the State statute at issue, and (b) that the decision below is not "final" within the meaning of 28 U.S.C. § 1257.

Appellees' discussion of the merits of this appeal only serves to highlight why their position is not correct and why this case should be heard by this Court. Furthermore, the decision below is properly before this Court pursuant to 28 U.S.C. § 1257(2).

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* References to "M.D.__" are to pages in Appellees' Motion to Dismiss dated October 13, 1981.

I

THE DECISION BELOW IS DANGEROUSLY WRONG AND SHOULD BE REJECTED FORTHWITH BY THIS COURT

Appellees argue, and the Connecticut Superior Court reasoned, as follows:

1. This Court recognizes a distinction between commercial speech and non-commercial speech, the former receiving less protection than the latter.

2. If appellants' speech was motivated by commercial concerns, it is commercial speech, it may be regulated and CUTPA may be applied to it consistent with the First Amendment.

3. What appellants' motivations were, and consequently whether this is commercial speech, cannot be determined simply by reading or hearing the speech in question. Rather, lengthy discovery into appellants' state of mind is required to decide that threshold question.

4. Because no discovery has yet been had, CUTPA's application to appellants' speech must be sustained, at least until after the completion of lengthy discovery proceedings and perhaps until after trial.

This position, we submit, is wrong* and would imperil constitutional liberties that are at the very heart of our democratic system. By so delaying the adjudication of whether speech is commercial or not, non-commercial speech is deprived of its full measure of constitutional protection, and First Amendment values are seriously eroded.

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* As we discussed in the Jurisdictional Statement, at pages 14-16, "[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so." *Eastern R.R. Pres. Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961).

This Court has expressed deep concern over just such an erosion. As this Court wrote in *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 455-56 (1978):

> Expression concerning purely commercial transactions has come within the ambit of the Amendment's protection only recently. In rejecting the notion that such speech "is wholly outside the protection of the First Amendment," *Virginia Pharmacy, supra*, at 761, we were careful not to hold "that it is wholly undifferentiable from other forms" of speech. 425 U.S., at 771 n.24. We have not discarded the "commonsense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. *Ibid.* To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

If appellees' position were adopted, as it was by the Connecticut Superior Court below, just such a dilution of First Amendment freedoms would be worked. In that event, every challenge to speech by a corporate citizen, and many challenges to speech by individual citizens, would as a matter of course survive the pleading stage and necessarily require intensive discovery before they are resolved. In that event, even the most obviously groundless challenge to fully protected speech (and we submit this is one such groundless challenge) would become fair game for litigation, including drawn-out inquiry into the speaker's subjective intent, and perhaps also for trial. In that event, "No Taxation Without Representation" might

even be actionable—upon an allegation that the speaker was commercially motivated and the argument misleading. In short, in that event, the "commonsense distinction," *id.*, between commercial speech and fully protected speech would become neither common nor sensible, and the "devitalization," *id.* at 456, of speech which this Court has warned against would become a reality.

The decision below thus denigrates our most precious democratic rights and chills the exercise of our most basic freedoms.

Not surprisingly, the decision below is not supported by any authority. To the contrary, as we demonstrated in the Jurisdictional Statement, the decision below is contrary to the prior decisions of this Court and is squarely in conflict with the holdings of five federal courts, including two United States Courts of Appeals, of which the Connecticut Superior Court was fully aware. As the cases and common sense both show, no inquiry into appellants' motivation is needed in order to decide whether their speech is fully protected or not. "If commercial speech is to be distinguished it 'must be distinguished by its content.' " *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 363 (1977). Appellants' motivation is simply irrelevant.

II

THE DECISION BELOW IS PROPERLY BEFORE THIS COURT PURSUANT TO 28 U.S.C. § 1257(2)

A. The Decision Below Upheld The Validity Of CUTPA As Applied.

Citing no law, appellees assert conclusorily that the decision below did not adjudicate the constitutional validity of a State statute. (M.D. 11-12). They say that "[appellants] did not draw in question the validity of the CUTPA . . . on the ground of its being repugnant to the Constitution," *id.*, and that the appeal must therefore be dismissed.

This contention is erroneous. Appellees themselves acknowledge, a few pages later in their Motion to Dismiss, that the constitutionality of CUTPA was very much at issue below. (M.D. 24, 28).* The Connecticut Superior Court also acknowledged that fact. (A-16).**

To be sure, appellants have made no challenge to the constitutionality of CUTPA on its face. No one here argues that CUTPA should be overturned in its entirety. It is only *the application* of CUTPA to appellants' speech that is challenged as unconstitutional, and that challenge was rejected below.

That is sufficient for purposes of this Court's appellate jurisdiction. As Stern and Gressman point out:

> The "validity" of a state statute is also said to have been sustained, within the meaning of § 1257(2), when the state court holds the statute applicable to a particular set of facts as against the contention that such an application is invalid on federal grounds. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282,; *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 61, n.3; *Cohen* v. *California*, 403 U.S. 15, 17-18; *cf. United States* v. *Knox*, 396 U.S. 77, 79, n.2 . . . . This is true even though the statute on its face bears no federal impediment.

R. Stern and E. Gressman, *Supreme Court Practice* § 3.4, at 163 (5th ed. 1978); *accord*, *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 440-41 (1979).

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* Thus, appellees at page 24 speak of "[t]he state court's determination [of] the constitutionality of [the] state statut[e]," and at page 28 they attempt to bolster an argument by saying, "especially when the validity of a state regulatory statute is at issue [as it is here]."

** The reference is to page 16 of Appendix A to the Jurisdictional Statement, where the Connecticut Superior Court's decision says, *inter alia*: "The party attacking the constitutionality of a statute must overcome a presumption of validity and prove unconstitutionality beyond a reasonable doubt. . . . [T]hat burden has not been met by [the appellants]."

Here, we submit, the Connecticut Superior Court resolved the constitutional issue before it, deciding that the First Amendment does not require appellees' CUTPA claim to be dismissed as long as appellants' speech was commercially motivated. That decision finally determined that issue, upholding the application of CUTPA to appellants' speech.

Appellees nonetheless characterize the decision below as a refusal to rule on the constitutional issue, pointing out that appellants' First Amendment defenses may still prevail—after discovery or trial.

Appellees' position, we submit, is totally at odds with this Court's "pragmatic," *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 486 (1975), interpretation of Section 1257.

Moreover, appellees' position is wrong even on its own terms. The State courts may not frustrate and avoid this Court's appellate review by purporting to refuse to pass on constitutional issues properly before them. As long as the *effect* of a decision is to uphold the application of a statute, an appeal lies. R. Stern and E. Gressman, *Supreme Court Practice*, *supra*, § 3.4, at 163. As this Court wrote in *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282 (1932):

> [T]he Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied [by the State courts] on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. . . . If the Constitution exacts a uniform application of this tax on appellant and his competitors, his constitutional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it [citations omitted]. . . . We therefore conclude that the purported non-federal ground put forward by the state court for its refusal to decide the constitu-

tional question was unsubstantial and illusory, and that the appellant may invoke the jurisdiction of this Court to decide the question.

Accord, *Super Tire Engineering Co.* v. *McCorkle*, 550 F.2d 903, 907 (3rd Cir.), *cert. denied*, 434 U.S. 827 (1977) (relying upon "the basic jurisprudential fact that not to decide is to decide").

In the case at bar, according to appellees' view of the case, the State court refused to rule on the constitutional issue and that refusal was "grounded in Connecticut case law, and impatience with state procedure does not entitle the appellants to [review by] this Court. . . ." (M.D. 24). If that supposed refusal was erroneous as a matter of federal constitutional law—and we submit it was—then that error is no bar to this Court's jurisdiction. *Lawrence* v. *State Tax Commission*, *supra*, 286 U.S. 276, and the authorities cited therein.*

However, assuming, *arguendo*, that this appeal is not properly before this Court pursuant to 28 U.S.C. § 1257(2), the decision below in any event may and should be reviewed by this Court under 28 U.S.C. § 1257(3), by writ of certiorari.

B. The Decision Below Is Final Within The Meaning Of 28 U.S.C. § 1257.

Appellees' approach to the finality requirement in § 1257 is a formal one which this Court has eschewed. The decision below "merely defer[red]" decision on the merits, appellees argue; therefore, it is not "final." (M.D. 15).

First of all, this is not a proper characterization of the decision below. The Connecticut Superior Court determined that whether speech is fully protected or merely commercial

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* Particularly where (as here) the State court's supposed refusal to decide a constitutional challenge properly before it itself results in a substantial chill to the federal constitutional rights at stake, there can be no question that the appeal is properly before this Court.

depends upon the speaker's motive and, therefore, that the First Amendment does not require that the complaint be dismissed on its face. That determination is final because appellants have no further recourse in seeking a determination that motive is immaterial to the scope of First Amendment protection. Absent review by this Court, there will be discovery and perhaps a trial on the issue of motive.

In these circumstances, the decision below satisfies the test of "finality" that this Court has laid down. This Court has said, repeatedly, that it follows a "pragmatic approach . . . in determining finality." *Cox Broadcasting Corp.* v. *Cohn*, *supra*, 420 U.S. at 486. Indeed, this Court in *Cox* rejected the very argument that appellees make in support of their motion to dismiss. In holding that the decision below in *Cox* was "final," despite the fact that it required that a trial on the merits be held, this Court held that delay (or "mere deferral," as appellees refer to it) is a most significant factor in determining whether the finality requirement has been satisfied:

> Delaying final decision of the First Amendment claim until after trial . . . will "leave unanswered . . . an important question . . . under the First Amendment," "an uneasy and unsettled constitutional posture that could only further harm" [First Amendment rights]. [citation omitted] . . . On the other hand, if we now hold that the First and Fourteenth Amendments bar civil liability . . ., this litigation ends.

420 U.S. at 485-86.

We showed in the Jurisdictional Statement that this same serious harm to First Amendment values would occur here if review were delayed. Appellees do not disagree. Accordingly, under this Court's "pragmatic approach" to the finality requirement, the decision below is "final" for purposes of Section 1257.

Village Voice, Inc. v. *Rinaldi*, 423 U.S. 883 (1975), cited by appellees, is not to the contrary. In that case, this Court found

not "final" a decision that denied a motion for summary judgment in a libel action on the ground that evidence of malice may exist which overcomes the constitutional privilege. That kind of decision is a far cry from a decision, like that below, that lets stand a claim under a State statute which (we submit, and five federal courts have found) challenges fully protected constitutional speech and which (we submit, and five federal courts have found) cannot, consistent with the First Amendment, be upheld *on a state of the facts.*

In the final analysis, we submit, the issue of finality is fact-bound; it is not a matter of simple application of legal doctrine. No case that appellees have cited, or that we have found, requires that this case not be heard. On the other hand, given the compelling showing (undisputed by appellees) of harm to First Amendment values that would result from a denial of review; given the concern for avoiding such harm so vigorously stated by this Court in a long line of Section 1257 decisions; and given that none of the interests served by the finality requirement would be harmed by taking jurisdiction, or granting certiorari, on this appeal, we respectfully submit that the decision below is "final" within the meaning of 28 U.S.C. § 1257.

CONCLUSION

This case is one that cries out for review by this Court. A narrow construction of 28 U.S.C. § 1257 is not required and should not stand in the way of that review. Accordingly, the Motion to Dismiss should be denied and this Court should note probable jurisdiction of this appeal or, alternatively, treat the Jurisdictional Statement as a petition for a writ of certiorari and grant the petition.

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Respectfully submitted,

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